TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 322

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., PETITIONER,

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 5, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No.

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., AN ILLINOIS CORPORATION, BANKRUPT,

Petitioner,

vs.

THE CENTRAL NATIONAL BANK AND TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 8418

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., AN ILLINOIS CORPORATION, BANKRUPT,

Plaintiff-Appellant,

vs.

THE CENTRAL NATIONAL BANK AND TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION,

Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

TRANSCRIPT OF RECORD FILED SEPT. 27, 1943.
PRINTED RECORD.

In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 8418

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., AN ILLINOIS CORPORATION, BANKRUPT,

Plaintiff-Appellant,

vs.

THE CENTRAL NATIONAL BANK AND TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION,

Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

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1 Pleas in the District Court of the United States of America, within and for the Northern Division of the Southern District of Illinois, held in the city of Peoria, in said Division and District, before the Honorable J. Leroy Adair, one of the Judges of said Court, on Monday, the 19th day of October, in the year of our Lord One Thousand Nine Hundred Forty-two, and of the Independence of the United States of America, the one hundred and sixty-seventh.

Present:

J. Leroy Adair, United States District Judge.
Robert Grant, United States Marshal.
Howard L. Doyle, United States Attorney.
G. W. Schwaner, Clerk, United States District Court.

Attest:

G. W. Schwaner, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois,

Northern Division.

Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt, *vs.* The Central National Bank and Trust Company of Peoria, a National Banking Corporation.	Civil Action. No. P-257.

Be It Remembered, that heretofore, to-wit: on the 3rd day of March, in the year of our Lord One Thousand Nine Hundred Forty-three, that being one of the days of the October, A. D. 1942 Term of the District Court of the United States for the Northern Division of the Southern District of Illinois, there was filed in the office of the clerk of the said court, a certain Complaint to Set Aside and Recover Preferences, which said Complaint was and is in the words and figures following, to-wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-257) * *

COMPLAINT TO SET ASIDE AND RECOVER PREFERENCES.

(Filed Mar. 3, 1943.)

To the Honorable Judges of the District Court of the United States, for the Southern District of Illinois:

Now comes Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Plaintiff herein, by Ira J. Covey, his attorney, and respectfully represents:

1. That the plaintiff is the duly elected, qualified and acting Trustee in Bankruptcy of the Estate of N. L. Rogers & Company, Inc., an Illinois Corporation, now bankrupt, and the Defendant, The Central National Bank and Trust Company of Peoria, is a National Banking Corporation, and a resident of the City of Peoria in the Northern Division of the Southern District of Illinois.

2. That the jurisdiction of this Court is invoked upon the ground that this is a suit by a Trustee in Bankruptcy to avoid preferences given by the Bankrupt to the Defendant within four months previous to the date of the adjudication of bankruptcy, as provided by Section 60 of the Acts of Congress relating to Bankruptcy.

3. That on, to-wit, April 11, 1938, the said N. L. Rogers & Company, Inc., an Illinois Corporation, filed a voluntary petition in bankruptcy in this Court, and was afterward on, to-wit, the 11th day of April, 1938, duly and regularly adjudged a bankrupt by this Court, and that there-
4 after, on, to-wit, May 25, 1938, plaintiff was elected * Trustee of said estate in bankruptcy, and that he immediately thereafter qualified as such Trustee and is now the duly elected, qualified and acting Trustee of said estate in bankruptcy.

4. That during all of the said four months period previous to the date of said adjudication of bankruptcy, commencing on the 11th day of December, A. D. 1937, and ending on the 11th day of April, A. D. 1938, the said N. L. Rogers & Company, Inc., now bankrupt, was indebted to the defendant in various sums ranging from, to-wit, $50,-

000.00, to, to-wit, $350,000.00; that the amount of said debt changed from day to day; that said debt during said four months period was either wholly unsecured or, if some portion thereof was secured, the value of the securities held by the defendant belonging to the said N. L. Rogers & Company, Inc., was at all times during said four months period of less value than the amount of such debt; that on each and every of the banking days of said four months period, the said N. L. Rogers & Company, Inc., now bankrupt, made transfer, assignment or delivery to the defendant of certain of its property, to-wit, lawful money of the United States of America, checks, drafts, bonds, stocks or other securities of the property of the said N. L. Rogers & Company, Inc., (the exact nature of such property being unknown to the plaintiff) in the sum or value ranging from the sum of $5.00 to $20,000.00; that the aggregate of said transfers so made by the said N. L. Rogers & Company, Inc., to the said defendant during said four months period is the sum of Three Hundred Eight Thousand One Hundred Twenty-two and 58/100 ($308,122.58) Dollars; that each and every of the said transfers of the property of the said N. L. Rogers & Company, Inc., to the defendant was applied by the defendant on a previously existing or antecedent unsecured debt of the said N. L. Rogers & Company, Inc., to the said defendant Bank.

5. That the said N. L. Rogers & Company, Inc., now bankrupt, at the time it made each and every of said transfers to the said defendant during said four months period was insolvent within the meaning of the Acts of Congress relating to bankruptcy.

6. That the said transfers, assignments and deliveries so made by the said N. L. Rogers & Company, Inc., were made within four months previous to the filing of the voluntary petition in bankruptcy herein by the debtor on, to-wit, April 11, 1938.

7. That the effect of the enforcement of said transfers or assignments of the property of the said N. L. Rogers & Company, Inc., now bankrupt, to the said defendant was to enable the said defendant to obtain greater percentages of its said debts against the said debtor than other creditors of the said debtor of the same class.

8. That the said defendant, at the various times it received said transfers, assignments or payments of said moneys or property of the said debtor, or the agent or agents of the defendant acting therein, had reasonable

cause to believe that the debtor was insolvent within the meaning of the Acts of Congress relating to bankruptcy.

9. That the said defendant has not surrendered such preferences, transfers or payments so made as aforesaid.

Wherefore, plaintiff demands judgment against the defendant for the sum of Three Hundred Eight Thousand One Hundred Twenty-two and 58/100 ($308,122.58) Dollars, with lawful interest thereon from the date of the filing of this Complaint; and that the plaintiff may have such other and further relief as may be just and proper; that the Clerk of this Court issue summons herein for service on the defendant, in accordance with the Statute in such cases made and provided.

/s/ Roscoe Herget,
Trustee in Bankruptcy of N. L. Rogers & Company, Inc., Bankrupt,
Plaintiff.

/s/ Ira J. Covey,
Attorney for Plaintiff,
1223 Jefferson Bldg.,
Peoria, Illinois.

Endorsed: Filed March 3, 1943. G. W. Schwaner, Clerk.

6 And afterwards, to-wit: on the 5th day of March, A. D. 1943, there was filed in the office of the clerk of said court, a certain Summons in a Civil Action, together with the Marshal's Return thereon, which said Summons with the Marshal's Return was and is in the words and figures following, to-wit:

7 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-257) * *

SUMMONS.

To the above named Defendant:

You are hereby summoned and required to serve upon Ira J. Covey, plaintiff's attorney, whose address is 1223 Jefferson Bldg., Peoria, Ill. an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service.

If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

G. W. Schwaner,
Clerk of Court.
By Dorothymae Olsen,
Deputy Clerk.

Date: March 3, 1943.

8 Endorsed: District Court of the United States * * (Caption—P-257) * * Summons in Civil Action Returnable not later than 20 days after service. Ira J. Covey, Atty., 1223 Jefferson Bldg., Peoria, Illinois.

Return on Service of Writ.

I hereby certify and return, that on the 3rd day of March, 1943, I received the within summons, and delivered a true copy thereof to F. M. Blossom, President of the within named Central National Bank & Trust Company at Peoria, Illinois, this third day of March, 1943.

/s/ Robert Grant,
United States Marshal.

Marshal's Fees

Travel	$ .06
Service	2.00
	2.06

Endorsed: Filed March 5, 1943. G. W. Schwaner, Clerk.

9 And afterwards, to-wit: on the 19th day of March, A. D. 1943, there was filed in the office of the clerk of said court, a certain Entry of Appearance, which said Entry of Appearance was and is in the words and figures following, to-wit:

19 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-257) * *

MOTION TO DISMISS.

ENTRY OF APPEARANCE.

Now comes the defendant, The Central National Bank and Trust Company of Peoria by John M. Elliott, Chester L. Anderson, and Walter Bachrach, and enters its appearance herein, and directs that all notices in this cause shall be served upon its undersigned attorneys.

/s/ John M. Elliott,
/s/ Chester L. Anderson,
/s/ Walter Bachrach,
Attorneys for Defendant.

John M. Elliott,
1401 Alliance Life Building,
Peoria, Illinois,
Telephone 6209.
Chester L. Anderson,
Central National Bank Building,
Peoria, Illinois,
Telephone 3-3884.
Walter Bachrach,
231 South La Salle Street,
Chicago, Illinois,
Telephone State 6862.

Received a copy of the above and foregoing entry of appearance this 18th day of March, A. D. 1943.

/s/ Ira J. Covey,
Attorney for Plaintiff.

Endorsed: Filed March 19, 1943. G. W. Schwaner, Clerk.

11 And afterwards, to-wit: on the 19th day of March, A. D. 1943, there was filed in the office of the clerk of said court, a certain Motion to Dismiss, which said Motion was and is in the words and figures following, to-wit:

12 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-257) * *

MOTION TO DISMISS.

Now comes the defendant, The Central National Bank and Trust Company of Peoria, by John M. Elliott, Chester L. Anderson and Walter Bachrach, its attorneys, and moves the court to dismiss the action on the following grounds:

1. It affirmatively appears from the face of the complaint that the said suit in which said complaint was filed was not instituted within two years subsequent to the date of adjudication in bankruptcy of N. L. Rogers & Company, Inc., as required by Section 11e of the Acts of Congress Relating to Bankruptcy.

2. The provision in said Section 11e for "further time" to institute suit does not apply to this case because: (a) the alleged causes of action set forth in said complaint did not exist prior to the filing of the said petition in bankruptcy of said N. L. Rogers & Company, Inc.; and (b) the alleged causes of action set forth in said complaint are predicated upon and created by said Acts of Congress Relating to Bankruptcy, and, therefore, did not exist and could not have existed at any time prior to the date of the filing of the petition in bankruptcy against said N. L. Rogers & Company, Inc.

13 3. That it appears from the complaint (a) that the supposed causes of action set forth therein to recover voidable preferences were created in favor of said trustee in bankruptcy, by virtue of the adjudication in bankruptcy of said bankrupt under the said Acts of Congress Relating to Bankruptcy and not otherwise; and (b) that said complaint, therefore, establishes that said supposed causes of action do not constitute any "claim" (existing before the time of filing of the petition in bankruptcy by said bankrupt, as to which a period of limitation under Federal or State law could run or expire) within the meaning of Section 11e of the Acts of Congress Relating to Bankruptcy.

4. No Federal statute of limitations other than that contained in Section 11e of said Acts of Congress Relating to Bankruptcy, and no State statute of limitations, is ap-

plicable to the alleged causes of action sued upon in the complaint herein.

5. It affirmatively appears from the face of the complaint that it fails to state a claim against the defendant upon which relief can be granted.

John M. Elliott,
Chester L. Anderson,
Peoria, Illinois,
Walter Bachrach,
231 So. La Salle St.,
Chicago, Ill.,
Attorneys for Defendant.

John M. Elliott,
1401 Alliance Life Building,
Peoria, Illinois,
Telephone 6209.
Chester L. Anderson,
Central National Bank Building,
Peoria, Illinois,
Telephone 3-3884.
Walter Bachrach,
231 South La Salle Street,
Chicago, Illinois,
Telephone State 6862.

Received a copy of the above and foregoing motion this 18 day of March, A. D. 1943.

Ira J. Covey,
Attorney for Plaintiff.

Endorsed: Filed March 19, 1943. G. W. Schwaner, Clerk.

14 And afterwards, to-wit: on the 24th day of May, A. D. 1943, the following further proceedings were had in said cause and were entered of record, to-wit:

15 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-257) * *

Monday, May 24, 1943.

Court met pursuant to adjournment.

Present, the Honorable J. Leroy Adair, Judge.

And now on this 24th day of May, A. D. 1943, it is ordered by the court that oral arguments on briefs submitted by Plaintiff and Defendant be set on Monday, June 7, 1943, at 2 o'clock p. m.

16 And afterwards, to-wit: on the 7th day of June, A. D. 1943, the following further proceedings were had in said cause and were entered of record, to-wit:

17 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—P-257) * *

Monday, June 7, 1943.

Court met pursuant to adjournment.

Present, the Honorable J. Leroy Adair, Judge.

On this 7th day of June, A. D. 1943, comes the plaintiff herein, by Ira J. Covey, his attorney, and comes also the defendant herein, by its attorneys, Walter Bachrach, John M. Elliott, and Chester L. Anderson;

And now this cause comes on for hearing by the Court on oral arguments on briefs heretofore submitted by both parties hereto, supporting Defendant's Motion to dismiss this cause. And after hearing arguments of counsel for both parties, and not being fully advised in the premises, takes same under advisement.

18 And afterwards, to-wit: on the 2nd day of September, A. D. 1943, a certain Order Allowing Defendant's Motion to Dismiss Complaint, was filed in the office of the clerk of said court and entered of record in said cause, which said Order was and is in the words and figures following, to-wit:

19 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—P-257) * *

This cause arises upon the Motion of the defendant to Dismiss the Complaint alleging that the action is barred by Section 11(e) of the Bankruptcy Act. Said Complaint purports to charge a cause of action to set aside for recovery certain preferences alleged to have been received by the defendant. Further affirmation arose from the Compiaint that the plaintiff was appointed Trustee of the estate in Bankruptcy on May 25, 1938, and immediately qualified as such Trustee, and that this cause of action

was filed with the Clerk on March 3, 1943. This motion having been argued orally, and Briefs having been submitted, the court finds:

The question before the court is purely the construction of Sec. 11(e) of the Bankruptcy Act, which said section contains the following language:

"A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy."

The Statutes of the State of Illinois after setting forth numerous provisions and limitations of the Statute of Limitations applicable to particular causes of action, none of which were applicable to the present cause, contains the following language: All other causes of action shall be commenced within a period of five years from the date the cause of action arose. The cause of action alleged in this Complaint charges that the Defendant accepted certain voidable preferences from the bankrupt, and asks that said preferences be set aside and the defendant be held accountable.

The court finds, that a suit for voidable preference did not and cannot arise under the laws of the State of Illinois, and that the inception of the right to sue arises with the appointment and qualification of the Trustee in Bankruptcy and no Statute of Limitation of the State of Illinois attached or determines the length of time within which the plaintiff shall bring suit; that no cause of action could arise under the Laws of the State of Illinois for voidable preference, and that no cause of action arose nor was anyone capable of enforcement of same until the Trustee was appointed under the Bankruptcy Act, and, therefore, the Statute of Limitation of the State of Illinois was not applicable and that the Statute of Limitation was governed by the Chandler Act which provides for a period of two years within which to bring suit after the appointment of such Trustee; that such limitation of two years was not enlarged upon by the extension of an unexpired time provided by the Statute of Limitation and that in this case more than two years has elapsed between the appointment of a Trustee and the filing of this suit.

Hence, it is the opinion of this court, and the court so

finds, that the Chandler Act provided a limit of two years from the appointment of a Trustee for the filing of a Suit of this nature, and that such construction applies in this case because the cause of action did not arise prior to the time of the appointment of a Trustee, and that this cause of action was created by the Bankruptcy Act and is governed by Section 11(e) of the Bankruptcy Act, and that such limitation provided in such section of two years has expired.

Therefore, the Motion to Dismiss the Complaint is allowed, and said Complaint is dismissed at the costs of the Plaintiff.

Dated at Peoria, Illinois, this 26th day of August, A. D. 1943.

J. Leroy Adair,
United States District Judge.

(Endorsed) Filed Sept. 2, 1943. G. W. Schwaner, Clerk.

21 And afterwards, to-wit: on the 11th day of September, A. D. 1943, there was filed in the office of the clerk of said court, a certain Notice of Appeal, which said Notice of Appeal was and is in the words and figures following, to-wit:

22 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois,

Northern Division.

Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt, *Plaintiff,* *vs.* The Central National Bank and Trust Company of Peoria, a National Banking Corporation, *Defendant.*	No. P-257.

NOTICE OF APPEAL.

To Circuit Court of Appeals for the 7th Circuit:

Notice Is Hereby Given that Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois

Corporation, Bankrupt, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the 7th Circuit from the final order or decree dated August 26, 1943, and filed and entered in the above entitled cause by the Honorable J. Leroy Adair, Judge of said Court on September 2nd, 1943, allowing the Motion of the Defendant to Dismiss said cause and dismissing said cause at costs of the Plaintiff.

/s/ Ira J. Covey,
Attorney for Plaintiff-Appellant.
Address: 1223 Jefferson Bldg., Peoria, Ill.

(Endorsed) Filed Sept. 11, 1943. G. W. Schwaner, Clerk.

23 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8418.

Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt, *Appellant.* *vs.* The Central National Bank and Trust Company of Peoria, a National Banking Corporation, *Appellee.*	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division. Honorable J. Leroy Adair, Judge Presiding.

STATEMENT OF POINTS.

(Filed Oct. 29, 1943. Kenneth J. Carrick, Clerk.)

(1) The District Court erred in dismissing the Complaint and in rendering judgment in bar of the plaintiff's action.

(2) The District Court erred in holding that under Section 11e of the Bankruptcy Act of 1938, plaintiff had only two years from the date of the appointment of the Trustee to bring this action.

(3) The District Court erred in holding that the Illinois 5-year Statute of Limitations (being Sec. 16 of Chapter 83 entitled "Limitations" of Bar Association Statute, 1943) did not apply to this case and that plaintiff's cause

of action was barred in two years from the date of the appointment of the Trustee.

(4) The District Court should have held that Section 11e of the Bankruptcy Act of 1938 made Section 16 of Chapter 83 of the Illinois Statute of Limitations applicable to this case and that the plaintiff had five years from the date of the adjudication of bankruptcy, or until April 11, 1943, to commence this action.

Ira J. Covey,
Attorney for Appellant,
1223 Jefferson Bldg., Peoria, Ill.

24 And afterwards, to-wit: on the 11th day of September, A. D. 1943, there was filed in the office of the clerk of said court, a certain Appellant's Designation of Record to be Contained in Record on Appeal, which said Designation was and is in the words and figures following, to-wit:

25 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-257) * *

APPELLANT'S DESIGNATION OF RECORD TO BE CONTAINED IN RECORD ON APPEAL.

The Clerk will please prepare the Record on Appeal herein to the Circuit Court of Appeals for the 7th Circuit and include therein the complete Record in this cause, including all pleadings, motions, orders, decrees, opinions, this designation of record and all other records or proceedings in this cause.

/s/ Ira J. Covey,
Attorney for Plaintiff-Appellant,
1223 Jefferson Bldg., Peoria, Ill.

Received a copy of the above designation this 11th day of September, A. D. 1943.

/s/ John M. Elliott,
/s/ Walter Bachrach,
/s/ Chester L. Anderson,
Attorneys for Defendant-Appellee.

(Endorsed) Filed Sept. 11, 1943. G. W. Schwaner, Clerk.

26 United States of America,
Southern District of Illinois,
Northern Division. } ss:

I, G. W. Schwaner, Clerk of the United States District Court in and for the Southern District of Illinois, do hereby certify that the annexed and foregoing is a true and complete transcript of the proceedings had of record and on file in the matter of Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt, *vs.* The Central National Bank and Trust Company of Peoria, a National Banking Corporation, Civil Action, No. P-257, (made in accordance with the Designation of Contents of Record on Appeal filed in said cause), as fully as the same appear from the original files and records thereof, now remaining in my office.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the aforesaid court at Peoria, this 25th day of September, A. D. 1943.

G. W. Schwaner,
(Seal) *Clerk, U. S. District Court.*

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, printed under my supervision and filed on the twenty-fourth day of November, 1943, in:

Cause No. 8418.

Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt,
Plaintiff-Appellant,

vs.

The Central National Bank and Trust Company of Peoria, A National Banking Corporation,
Defendant-Appellee,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of May, A. D. 1944.

(Seal)

Kenneth J. Carrick
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the sixth day of October, in the year of our Lord one thousand nine hundred and forty-two, and of our Independence, the one hundred and sixty-seventh.

Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, an Illinois Corporation, Bankrupt,
Plaintiff-Appellant.
8418 *vs.*
The Central National Bank and Trust Company of Peoria, A National Banking Corp.,
Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

And, to-wit: On the twenty-seventh day of October, 1943, there was filed in the office of the Clerk of this Court, a Stipulation to file Statement of Points instanter, which said Stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

~~8~~8418.

Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, an Illinois Corporation, Bankrupt,
Appellant.
vs.
The Central National Bank and Trust Company of Peoria, a National Banking Corp.,
Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

Honorable J. Leroy Adair, Judge Presiding.

STIPULATION.

It Is Hereby Stipulated and Agreed by and between the above parties, by their respective attorneys, that the Statement of Points in the above entitled cause which was not

filed in the United States District Court be filed instanter in the United States Circuit Court of Appeals for the Seventh Circuit and made a part of the record and printed in the record.

Ira J. Covey,
Attorney for Appellant.
John M. Elliott,
Chester L. Anderson,
Walter Bachrach,
Attorneys for Appellee.

Endorsed: Filed October 27, 1944. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the twenty-ninth day of October, 1943, the following further proceedings were had and entered of record, to-wit:

Friday, October 29, 1944.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.

Roscoe Herget, Trustee, etc., *Plaintiff-Appellant,* vs. The Central National Bank and Trust Company of Peoria, *Defendant-Appellee.*	8418	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division

Pursuant to stipulation of counsel it is ordered that the Statement of Points herein be filed and made a part of the record in this cause instanter.

And on the same day, to-wit: On the twenty-ninth day of October, 1943, there was filed in the office of the Clerk of this Court, a Statement of Points, which said Statement of Points appear on page 12 of the printed transcript of record certified herewith.

And afterwards, to-wit: On the thirteenth day of January, 1944, the following further proceedings were had and entered of record, to-wit:

Thursday, January 13, 1944.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Roscoe Herget, Trustee, etc., *Plaintiff-Appellant,* vs. The Central National Bank and Trust Company of Peoria, *Defendant-Appellee.*	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

8418

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Ira J. Covey, counsel for appellant, and by Mr. Walter Bachrach, counsel for appellee, and the Court takes this matter under advisement.

And afterwards, to-wit: On the fifth day of February, 1944, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8418. **October Term, 1943, January Session, 1944.**

ROSCOE HERGET, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt,
Plaintiff-Appellant,

vs.

THE CENTRAL NATIONAL BANK AND TRUST COMPANY OF PEORIA, A National Banking Corporation,
Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

February 5, 1944.

Before EVANS and SPARKS, *Circuit Judges*, and LINDLEY, *District Judge*.

SPARKS, *Circuit Judge*. The trustee in bankruptcy appeals from the dismissal of his action to recover preferences alleged to have been given by the bankrupt within four months previous to the filing of its voluntary petition in bankruptcy. The District Court sustained appellee's motion to dismiss the complaint on the ground that it was barred by the applicable statute of limitations, and the correctness of that ruling is the only question presented to us.

The bill of complaint, filed March 3, 1943, alleged that N. L. Rogers and Company was adjudicated a bankrupt on April 11, 1938, on its petition filed on that date, and appellant was thereupon elected and qualified as trustee of its estate on May 25, 1938. It further alleged that dur-

ing the four-month period prior to the adjudication, the company was indebted to appellee in sums varying from $50,000 to $350,000 from day to day, all of which indebtedness was either unsecured or very inadequately secured, and that during that period the company delivered to appellee money and securities in amounts varying from $5 to $20,000, aggregating $308,122, all of which was applied by appellee on the antecedent unsecured debt, thereby effecting an illegal preference, recovery of which appellant demanded in the full amount.

Appellee contends, and the District Court held, that the action was barred by § 11e of the Bankruptcy Act, 11 U. S. C. A. § 29e:

> "A receiver or trustee may, within two years subsequent to the date of adjudication *or within such further period of time as the Federal or State law may permit*, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. * * *" (Our ital.)

Appellee contends that § 11e fixes a two-year period within which the current suit could be brought, inasmuch as there is no other federal or state law under which the period could be extended. Appellant, on the other hand, contends that the section permits maintenance of the suit by reason of the extension allowed therein by state law, spelling out a five-year period by interweaving § 11e and two sections of the Illinois Statute on Limitations, Chap. 83, Ill. R. S.

The District Court held, we think correctly, that inasmuch as the suit, being one to avoid a preference, arose under the Bankruptcy Act, the Illinois statute of limitations could not operate to fix the time within which it could be brought. It is obvious that the cause of action is predicated solely upon § 60 of the Bankruptcy Act, 11 U. S. C. A. § 96, and although subsection (b) of that section provides for concurrent jurisdiction in state and federal courts for suits brought thereunder, it does not specify the period within which such suits must be brought, hence the applicability of § 11e above. Both parties are agreed that § 11e controls, but they differ as to its proper construction.

In order to arrive at the five-year period which appellant contends applies here, he relies upon §§ 12 and 15 of the Illinois Act. § 12 furnishes the introduction to the scheme for limitations for bringing personal actions: "The following actions can only be commenced within the periods hereinafter prescribed, *except when a different limitation is prescribed by statute.*" (Our ital.) § 15 provides that "all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." Appellant contends that § 11e, in providing for a two-year period, "or * further period of time as Federal or State law may permit," prescribes "a different limitation" which brings § 15 into effect to fix the limitation at the five-year period provided for "all civil actions not otherwise provided for." This is a good illustration of the process of pulling oneself up by one's own bootstraps. The exception contained in each section (11e and 12) must be relied upon to bring into operation that contained in the other before any occasion arises for the application of the § 15 provision for the five-year period. This requires a complex construction of § 11e when in fact the meaning of that section seems quite simple—that where a cause of action has not already expired at the time of the filing of the petition in bankruptcy, a receiver may sue on it within whichever is the longer of two periods, two years, or that provided by the statute permitting or creating the cause. Since it is the Bankruptcy Act which creates the cause of action here, it must provide the period for bringing it, and in the absence of other provision, the two-year one applies.

Appellant contends that if the two-year period here fixed is affirmed, the effect will be to provide one period for the action if brought in the bankruptcy court, and a different one for the same action if brought in the state court, as it may be under the alternative provision of § 60(b). This does not follow. The Illinois limitation statute provides the five-year period only in case no other is provided. But if this case were brought in the state court, since the action could arise only under § 60(b) of the Bankruptcy Act, the limitation provided by that Act would operate just as it would if the cause were brought in the bankruptcy court. There is no applicable state statute for the reason that the cause of action was not created by the state. Appellant cites and quotes from various cases

and text writers, but we find none of his authorities helpful or applicable to the facts here presented, for none of them deal with the effect of § 11e on causes of action created by the Bankruptcy Act. In fact we have found no case strictly in point.

Judgment affirmed.

Endorsed: Filed February 5, 1944. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the fifth day of February, 1944, the following further proceedings were had and entered of record, to-wit:

Saturday, February 5, 1944

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Roscoe Herget, Trustee, etc., *Plaintiff-Appellant,* vs. The Central National Bank and Trust Company of Peoria, *Defendant-Appellee.*	8418	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Illinois, Northern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed, with costs.

And afterwards, to-wit: On the nineteenth day of February, 1944, there was filed in the office of the Clerk of this Court, a Petition for Rehearing, which said Petition is in the words and figures following, to-wit:

No. 8418

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

ROSCOE HERGET, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt,

Plaintiff-Appellant,

vs.

THE CENTRAL NATIONAL BANK AND TRUST COMPANY OF PEORIA, a National Banking Corporation,

Defendant-Appellee.

Appeal from the District Court of the United States, Southern District of Illinois, Northern Division.

Honorable J. Leroy Adair, Judge Presiding.

Appellant's Petition for Rehearing.

FEB 19 1945

IRA J. COVEY,
1223 Jefferson Bldg.,
Peoria, Ill.,
Attorney for Appellant.

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 8418

ROSCOE HERGET, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt, Plaintiff-Appellant, vs. **THE CENTRAL NATIONAL BANK AND TRUST COMPANY OF PEORIA, a National Banking Corporation,** Defendant-Appellee.	Appeal from the District Court of the United States, Southern District of Illinois, Northern Division. Honorable **J. Leroy Adair,** Judge Presiding.

Appellant's Petition for Rehearing.

To the Honorable Presiding Judges of said Court:

Now comes Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, bankrupt, Plaintiff-Appellant and Petitioner herein, and petitions the Court to grant a rehearing herein, in accordance with Rule 22 of this Court, and in support thereof respectfully makes the following suggestions:

On page 3 of the opinion of the Court it is said that the meaning of Section 11e of the Bankruptcy Act "seems quite simple—that where a cause of action has not already expired at the time of the filing of the Petition in Bankruptcy, a receiver may sue on it within whichever is the longer of two periods, two years, or that provided by the statute permitting or creating the cause. Since

it is the Bankruptcy Act which creates the cause of action here, it must provide the period for bringing it, and in the absence of other provision the 2-year one applies."

The Court here holds that suit may be brought by a receiver or trustee within whichever is the longer of the two periods, two years, or that provided by the statute permitting or creating the cause.

The Federal Statute (Sec. 60b of the Bankruptcy Act) permits the suit to be brought in the State Court, and when it is brought there, it being an action created by statute, it is a cause of action not otherwise provided for within the meaning of Section 15 of the Illinois Limitations Act and is not barred until five years after the date of the accrual of the action. See *Parmelee* v. *Price*, 208 Ill. 544-559; *Blakeslee Warehouses Inc.* v. *City of Chicago*, 369 Ill. 480-485 and other cases cited on page 8 of our original brief.

The result of the Court's reasoning, as it seems to us, is that when the suit is brought in the federal court, the action will be barred in two years and when in the state court, will be barred in five years.

True it is that the action is created by the federal statute but it is equally true that it is an action not otherwise provided for by Section 15 of the Illinois Limitations Act which, under the Illinois cases, is barred in five years. It is not material as to whether the action was created by the Bankruptcy Act or existed at common law.

It is also true that the situation arising under the Illinois Act is somewhat complex, but that does not justify a reading into Section 11e of a condition or exception that does not appear therein. See *Rybold* v. *Jarrett*, 112 Fed. (2d) 642 (4th Cir.).

The construction placed upon Section 11e by the Court, in our opinion, is contrary to the meaning as found in

the Report of the House Judiciary Committee filed July 29, 1937, Report No. 1409. See original brief, page 16.

Section 11e of the Chandler Act applies equally to all causes of action. The character of the suit is immaterial. See cases cited page 11 of our original brief.

The decision of the Court, in our opinion, is contrary to the weight of authority on the subject. See cases cited paragraph 13 of our original brief.

On page 3 of the opinion of the court it is said: "Since it is the bankruptcy act which creates the cause of action here, it must provide the period for bringing it, and in the absence of other provision the 2-year one applies." We do not think that this necessarily follows. Section 11e permits the suit to be brought during the period provided by either the state or federal law and as the state law permits the suit to be brought within five years, the federal court should also permit it to be brought within the same length of time.

For the foregoing reasons, it is respectfully submitted that a rehearing of this case should be granted.

Respectfully submitted,

IRA J. COVEY,
1223 Jefferson Bldg.,
Peoria, Illinois,
Attorney for Plaintiff-Appellant.

Endorsed: Filed February 19, 1944. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fifth day of April, 1944, the following further proceedings were had and entered of record, to-wit:

Wednesday, April 5, 1944.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Roscoe Herget, Trustee, etc., *Plaintiff-Appellant.* vs. The Central National Bank and Trust Company of Peoria, *Defendant-Appellee.*	8418	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division

It is ordered by the Court that the Petition for a Rehearing of this cause be, and it is hereby, denied.

And afterwards, to-wit: On the fourteenth day of April, 1944, the Mandate of this Court issued to the District Court of the United States for the Southern District of Illinois, Northern Division.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the proceedings had and papers filed, excepting appearances of counsel, briefs of counsel and motions and orders extending time for filing briefs, in:

Cause No. 8418.

Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt,
Plaintiff-Appellant.

vs.

The Central National Bank and Trust Company of Peoria, A National Banking Corporation,
Defendant-Appellee.

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of May, A. D. 1944.

(Seal)

Kenneth J. Carrick
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

[fol. 34] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

No. —

ROSCOE HERGET, Trustee, Etc., Petitioner,

vs.

THE CENTRAL NATIONAL BANK AND TRUST COMPANY OF PEORIA

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 5th, 1944.

Frank Murphy, Associate Justice of the Supreme Court of the United States.

Dated this 10th day of June, 1944.

[fol. 35] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 322

ROSCOE HERGET, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt,

Petitioner,

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, a National Banking Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

IRA J. COVEY,
Peoria, Illinois,

WILLIAM D. DONNELLY,
Washington, D. C.,
Counsel for Petitioner.

CUMMINGS & STANLEY,
Washington, D. C.,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No.

ROSCOE HERGET, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt,

Petitioner,

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, a National Banking Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois corporation, Bankrupt, prays that a writ of certiorari issue to review the judgment and decree of the Circuit Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Southern District of Illinois, Northern Division.

Opinions Below.

The opinion of the United States District Court for the Southern District of Illinois (R. 9) is reported in 53 F. Supp. 265. The opinion of the Circuit Court of Appeals (R. 20-23) is reported in 141 F. 2d 150.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered February 5, 1944 (R.). Petition for rehearing seasonably filed by petitioner (R. 25) was denied on April 5, 1944 (R. 31). By order of Mr. Justice Murphy entered June 10, 1944, time within which to file petition for certiorari was extended to August 5, 1944 (R. 34). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether an action to recover a preference under section 60b of the Bankruptcy Act is by the limitation prescribed by section 11e of the same Act, added by the Chandler Act of June 22, 1938, barred at the end of two years from the date of adjudication or is, as petitioner contends and as is specifically provided in section 11e, barred only at the end of the longer period provided by state law—in this case five years.

2. Whether the five year period of limitation prescribed by Ill. Rev. Stats. (State Bar ed.) c. 83, secs. 12 and 15, constitutes the period of time permitted by State law and adopted by section 11e of the Bankruptcy Act as the limitation for the bringing of actions based on rights created by the Bankruptcy Act such as the trustee's right to recover a voidable preference under Section 60b.

Statutes Involved.

Subsection 11e of the Bankruptcy Act, added by the Chandler Act, June 22, 1938, c. 575, sec. 1, 52 Stat. 840, 849 (11 U. S. C. sec. 29e) provides:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further

period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. * * *

The Illinois Statute of Limitations (Ill. Rev. Stats. (State Bar ed. 1943) c. 83) provides:

Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, except when a different limitation is prescribed by statute.

Sec. 13. Actions for slander or libel shall be commenced within one year next after the cause of action accrued.

Sec. 14. Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction or for seduction, or for criminal conversation, shall be commenced within two years after the cause of action accrued.

Sec. 15. Actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and *all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.*

Statement.

The complaint alleged, and the defendant's motion to dismiss (R. 7) admits the pertinent facts:

On April 11, 1938, N. L. Rogers & Company, Inc., an Illinois corporation, was adjudged a bankrupt in the District Court of the United States for the Southern District of Illinois, Southern Division (R. 2). Petitioner was elected trustee on May 25, 1938 and immediately thereafter qualified as such trustee (R. 2).

On March 3, 1942, the petitioner, Roscoe Herget, as Trustee in Bankruptcy of the Rogers Company, filed his complaint under Section 60 of the Bankruptcy Act in the same court against the respondent, The Central National Bank & Trust Company of Peoria, a National Banking Corporation, to recover preferences amounting to $308,122.58 alleged to have been given by the bankrupt to the respondent at a time when the bankrupt was insolvent and the defendant had reasonable cause to believe the bankrupt to be insolvent, all within four months prior to the filing of the petition in bankruptcy, April 11, 1938 (R. 2-4).

The defendant (respondent herein) moved to dismiss the complaint on the ground that because the suit had been instituted at a date more than two years subsequent to the date of the adjudication in bankruptcy, it was barred by the provisions of section 11e of the Bankruptcy Act as amended by the Chandler Act of June 22, 1938, 52 Stat. 849, (R. 7-8).

The district court held that the cause of action accrued with the appointment and qualification of the trustee, and because it arose under the Bankruptcy Act, it was barred by section 11e upon the expiration of two years from the date of appointment of the trustee and entered its order accordingly (R. 9-11).

On February 5, 1944, the Circuit Court of Appeals filed its opinion holding petitioner's cause of action barred by the two-year clause of section 11e and not within the operation of the alternative clause of the same subsection: "or within such further period of time as the * * * State law may permit," so as to make applicable the five-year period permitted by the State law, Rev. Stats. (State Bar ed.) c. 83, secs. 12, 15, p. 2012 (R. 20-23). Judgment of affirmance was entered the same day (R. 23). Petition for rehearing was denied April 5, 1944 (R. 31).

Specifications of Error to Be Urged.

The United States Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that under subsection 11e of the Bankruptcy Act, action to recover preferences is barred unless brought within two years subsequent to the date of adjudication.

2. In failing to hold that under subsection 11e of the Bankruptcy Act the period of limitations on actions to recover preferences in the Federal courts for Illinois is the five-year period provided by section 15 of the Illinois Revised Statutes and adopted by reference by subsection 11e.

3. In holding that the clause of the first sentence of subsection 11e permitting institution of proceedings on any claim "within such further period of time as the Federal or State law may permit" is inapplicable to actions to recover preferences.

4. In interpolating the language "permitting or creating the cause" in the second alternative clause of the first sentence of section 11e so as to make it read "within such further period of time as the Federal or State law [permitting or creating the cause] may permit."

5. In holding that "since it is the Bankruptcy Act which creates the cause, it must provide the period for bringing it."

6. In holding that "there is no applicable state statute for the reason that the cause of action was not created by the State."

7. In failing to hold that the alternative clause of the first sentence of subsection 11e applies, according to its terms, to all proceedings by the trustee in behalf of the

estate upon any claim regardless of the law creating such claim.

8. In holding that the clause of section 11e expressly adopting the limitation fixed by State or Federal law does not extend to causes of action created by the Bankruptcy Act.

Reasons for Granting the Writ.

The facts alleged in the complaint are admitted by the motion to dismiss. The cause of action arose on April 11, 1938, the date of adjudication (R. 27). Suit was filed by the trustee March 3, 1943, more than two, but less than five, years subsequent to that date (R. 2).

The trustee relies on the provisions of Section 11e of the Bankruptcy Act as amended (11 U. S. C. sec. 29e):

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy.

And the trustee further relies on sections 12 and 15 of the Illinois Statute of Limitations (Ill. Rev. Stats. (State Bar ed.) c. 83, secs. 12 and 15):

> Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, except when a different limitation is prescribed by statute.
>
> Sec. 15. Action on unwritten contracts * * * and, all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.

Because section 11e provides that the trustee may institute proceedings in behalf of the estate upon "any claim"

within two years subsequent to the date of adjudication *or within such further period of time as the* * * * *State law may permit*, the trustee contends that suit brought within the five-year period, fixed by the Illinois law, and by section 11e adopted by reference, is within time.

The Circuit Court of Appeals by *obiter* attempted to becloud the plain meaning of the state statute.[1] But, the court placed the ground of its affirmance squarely on a purported paraphrase of the language involving a violent interpolation of language so as to narrow the ambit of the clause "within such further period of time as the Federal or State law may permit" and make the period established by state law operative only where such further period is "provided by the statute permitting or creating the cause" (R. 22). A fundamental error also appears in the court's holding (R. 22): "since it is the Bankruptcy Act which creates the cause of action here, it must provide the period for bringing it * * *."

1. **The decision of the court below is in disregard of, and violates the plain language of the Statute.** The language of section 11e is clear and effect may be given to all its parts without necessity for construction or interpolation such as that in which the court below engaged. When the meaning of a statute is plain, there is no room for interpretation. *Lake County* v. *Rollins*, 130 U. S. 62; *Lewis* v. *United States*, 92 U. S. 618, 5[illegible] Section 11e obviously authorizes suit by the receiver or trustee within two years subsequent to date of adjudication *or* within the period of

[1] Even if "statute" as used in Section 12 of the Illinois law be deemed to include Federal statutes, it still is clear that "a different limitation is [not] prescribed by statute" because the Federal statute expressly prescribes two years "or within such further period of time as the Federal or State law may permit." The limitation, if any, in section 11e must necessarily be the maximum period and it therefore prescribes a period identical with, and not "different" from, that prescribed by section 15 of the State law.

time permitted by other federal or state law, whichever is longer, with the proviso that no claim already barred at the date of the petition shall be revived.[2] The time provision in the first sentence of section 11e is unitary although stated in the alternative: the two alternative clauses are unseparated even by a comma and obviously fix a single mode of measurement to be applied to "any claim." As was stated by this Court in *United States* v. *Goldenberg*, 168 U. S. 95, 102-103:

> The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent.

No reason for departure from the general rule was suggested by the court below. Taken in their ordinary and received import and according to accepted rules of grammar and punctuation the words of subsection 11e require reference to the state statute of limitations to ascertain the time there permitted for the bringing of such a suit. If longer than two years, the trustee is to have the benefit of it.

The Illinois state law permits suit on this claim at any time within five years after the cause of action accrues. —Illinois Rev. Stats. (State Bar ed.), c. 83, provide:

---

[2] The concluding and modifying clause, "against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition" obviously has only the same effect as though it were in specific proviso form such as was used in the Bankruptcy Act of 1867, sec. 2 (14 Stat. 518):

> *Provided*, that nothing herein contained shall revive a right of action barred at the time such assignee is appointed."

> Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, *except when a different limitation is prescribed by statute*: * * *
>
> Sec. 15. Actions on unwritten contracts, express or implied * * * and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.

Respondent in the court below argued that within the meaning of the italicized clauses, section 11e prescribed a different limitation and this action is "otherwise provided for."

The respondent's theory leads only into a sort of statutory and endless renvoi which can be resolved only by resolving the main question—the meaning of section 11e. For respondent asserts that the initial reference in section 11e to the state statute brings up against the provision in section 12 of the state law: "except when a different limitation is prescribed by statute." Respondent takes this as a re-reference to section 11e of the Bankruptcy Act and on the re-reference selects the two-years clause as constituting a "different limitation" "prescribed by statute," this time entirely ignoring the clause which refers to the state law. The respondent's theory thus involves a circular reasoning which cannot be accepted because of its absurdity. For there is no more reason on the re-reference for thus ignoring and nullifying the part of section 11e which adopts the further period permitted under state law than for so doing on the initial consideration of section 11e. Cf. 1 Beale, Conflict of Laws, sec. 7.3, pp. 56-57.

When section 11e provides for "such further period of time as the * * * State law may permit" it is difficult to comprehend how it may be regarded as providing "a different limitation" or as making the action one "otherwise provided for" within the meaning of those clauses as used in the sections of the Illinois statutes above quoted.

It is therefore submitted that the meaning of section 11e is plain without necessity for construction and under it chapter 83, section 15 of the Illinois Revised Statutes authorizes suit in this case within five years from the date the cause of action arose.

2. **The interpretation by the court below involves judicial legislation.**—One of the reasons for the enactment of Section 11e as a part of the Chandler Act was the elimination of the confusion which had arisen in the application of Section 11d of the Bankruptcy Act of 1898, 30 Stat. 549, which provided:

> Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

As early as September 1931, the committee on legislation of the National Association of Referees in Bankruptcy recommended a number of changes in the Act. In recommending amendment of subsection 11d, approximately the first sentence of subsection 11e as finally enacted, that committee said (6 J. N. A. Referees Bank. 61, 65):

> Decisions under this section are in hopeless confusion. Question arises why should the trustee bring a suit after the estate has been closed when he is *functus officio*. Question also arises whether this means two years after the case has been reopened and closed. There is some doubt in some of the cases as to whether the state law limitation controls in some instances, or whether this is an exclusive limitation.[3] As amended it becomes plain that a trustee can bring a suit within two years after adjudication regardless of the expiration of the statute of limitations within that period. In other words, if the statute has not run at the time *the petition* in bankruptcy is filed, the trustee has two

[3] Cf. *Shreck* v. *Hanlon*, 66 Neb. 451, 453 (1902); *Sheldon* v. *Parker*, 66 Neb. 610, 628-631 (1902); *Fuller* v. *Rock*, 125 Ohio State 36 (1932); *Isaacs* v. *Neece*, 75 F. 2d 846, 850 (C.C.A. 5, 1935) with *Davis* v. *Willey*, 273 Fed. 397 (C.C.A. 9, 1921); *Silverman* v. *Christian*, 123 N. J. Eq. 506 (Ch. 1938).

> years after *adjudication* to bring suit. By fixing two years after adjudication, there can be no question but that the reopening of a case would not extend the time. Moreover, if the statute of a state provides a longer period, the provision as amended would not reduce the period.

With these objectives, the Congress in the Chandler Act enacted that the trustee:

> may two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim * * *.

Yet the court below by construction for which its suggests no authority, justification or necessity, misinterprets the section, perverts its purpose and once again introduces doubt and ambiguity, where certainty is so essential, by interpolating the italicized language to make it provide: The trustee—

> may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law *creating the cause of action* may permit, institute proceedings in behalf of the estate upon any claim * * *.

Thus, the trustee who, on the plain wording of the statute was fully justified in assuming that he had the full five-year period allowed by the Illinois statute within which to bring this suit, has been lulled into a false sense of security, only to find himself entrapped by the arbitrary construction adopted by the court below. Unless the decision is corrected, innocent creditors will in effect have been tricked by the statute and so deprived of the equality of distribution which is one of the primary objectives of the Bankruptcy Act.

3. **The decision of the court below, in ignoring the Rules of Decision statute, has decided a federal question in a way**

clearly in conflict with the applicable decisions of this Court.—The opinion of the court holds (R. 22):

> Since it is the Bankruptcy Act which creates the cause of action here, it *must* provide the period for bringing it, and in the absence of other provisions, the two-year one applies. * * *
>
> * * * *There is no applicable state statute for the reason that the cause of action was not created by the state.* * * * (Emphasis supplied).

These propositions are plainly erroneous. It is well recognized that causes of action are frequently created by federal law without specific prescription of periods of limitation for the enforcement thereof. It is also established that when a cause of action is created by federal statute without provision of any period of limitation, the result is to make operative the Rules of Decision Statute, 28 U. S. C. sec. 725, under which the state statute of limitations will necessarily control. *Campbell* v. *Haverhill*, 155 U. S. 610, 614-616; *McClaine* v. *Rankin*, 197 U. S. 154, 158; *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, 397; *Rawlings* v. *Ray*, 312 U. S. 96; *Williamson* v. *Columbia Gas & Electric Corporation*, 110 F. 2d 15 (C. C. A. 3, 1940) cert. denied 310 U. S. 639.

Perusal of the opinion makes it clear that the decision is founded upon this misconception of elemental law in clear conflict with the decisions of this Court.

4. **The history and objectives of subsection 11e require that it be applied in accordance with its plain letter.**—The difficulties it was intended to obviate and its legislative history all show that subsection 11e was drawn having de[illegible]gard to the Rules of Decision statute and that it [illegible]nded primarily merely to toll the running of the statutes of limitation, federal or state, which, in the absence of specific limitation in the Bankruptcy Act, would apply to all suits brought by the trustee and in some instances might bar action by the trustee before he had had

opportunity to act or before the expiry of the two-year period contemplated as an essential minimum.

A. **The language of Section 11e is the result of careful and prolonged study by experts in the field.** Section 11e as added by the Chandler Act represents no hurried legislative action to meet problems only dimly perceived. In large part it represents the work of the National Bankruptcy Conference, an unofficial body organized in 1932 and made up of various groups interested in the perfecting of the Act, including the American Bar Association, the Commercial Law League, the American Bankers Association and many others. The drafting committee[4] of the Conference prepared and discussed seven successive drafts of a bill directed toward a general overhauling of the 1898 Act (Hearings, H. Committee on the Judiciary, H. R. 6439, amended, re-introduced and reported as H. R. 8046, June 1937, p. 2). For at least two years other numerous and eminent members of the legal profession, referees in bankruptcy, specialists in bankruptcy, judges and professors gave their best efforts to the drafting of this law. The House Judiciary Committee worked on the bill for a period in excess of four years (81 Cong. Rec., Pt. 8, pp. 8646-8647 (1937)).

B. **Section 11e was addressed to specific problems.** Subsection 11e is not an amendment of subsection 11d. On the contrary, it is an entirely new subsection. We recog-

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[4] The drafting committee included such men as:

Paul H. King, Chairman, member of the Advisory Committee on Commercial Law and Bankruptcy, American Bar Association, Chairman of the Committee on Uniformity of Practice, National Association of Referees in Bankruptcy, Detroit, Michigan.

Carl D. Friebolin, Chairman, Committee on Legislation, National Association of Referees in Bankruptcy, Cleveland.

James A. McLaughlin, Harvard Law School.

Jacob I. Weinstein, member, Bankruptcy Committee, Commercial Law League of America, Philadelphia, Pa. (16 Doc., A. G. Comm. on Bank. Admn. (2d Ser.) Doc. No. 10, p. vi).

nize, therefore, that little or no direct assistance in the interpretation of subsection 11e is to be obtained by reference to decisions construing subsection 11d of the 1898 Act or the provisions as to limitations contained in section 2 of the Bankruptcy Act of 1867. The decisions under section 11d of the 1898 Act are helpful, however, insofar as they point out the ambiguities and moot the questions which were sought to be remedied by passage of subsection 11e. The specialists who had to do with the drafting were thoroughly conversant with these decisions and, of course, addressed their efforts to the problems presented by them:

(1) On its face the statute was ambiguous because of its reference to "two years after an estate has been closed." See 6 J. N. A. Referees Bank. 61, 65; S. Hearings, Subcommittee of the Committee on the Judiciary, S. 3866, 77th Cong., 1st sess. (1932) pp. 932-935; 9 Doc., A. G. Comm. on Bank. Adm'n (2d Ser.) Doc. No. 1.

(2) Question had arisen as to whether re-opening and again closing the estate extended the time. *Bilafsky* v. *Abraham*, 183 Mass. 401 (1903); *Kinder* v. *Scharff*, 231 U. S. 517 (1913).

(3) The decisions were in conflict as to whether the statute extended the period fixed by State law. 6 J. N. A. Referees Bank. 61, 65. See e.g. *Davis* v. *Willey*, 273 Fed. 397 (C. C. A. 9, 1921); *Isaacs* v. *Nevee*, 75 F. 2d 846, 850 (C. C. A. 5, 1935). It had been specifically held that because subsection 11d was in the form of a *prohibition* and purported only to limit the time within which a suit could be brought, it could not be construed to *extend* the period fixed by State law. *Charlesworth* v. *Hipsh*, 84 F. 2d, 834, 837 (C. C. A. 8, 1936).[5]

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[5] In construing subsection 11d before its amendment, this same distinction between *limitation* or *prohibition* as contrasted with *extension* was followed as late as 1941 in *Nairn* v. *McCarthy*, 120 F. 2d 910, 912 (C.C.A. 7). Judge Major in that case held:

"As we read the provision, however, it does not grant an extension of time, but is a prohibition against the institution of actions

(4) It had also been indicated that because the trustee's title did not vest until date of adjudication, the trustee could not sue on a cause of action barred as of that date. *In Re Dunavant*, 96 Fed. 542; *Harrod* v. *Farrar*, 68 Kan. 153, 157 (1903); *Gayland* v. *Arrowood*, 172 N. C. 591, 593 (1916).

C. **Section 11e, drafted and construed solely as a statute of extension, solved the problems presented.** No substantial change of subsection 11d, insofar as it operated as a statute of limitations barring suit against the trustee, was deemed desirable. Therefore, it was left in its prohibitory form with certain clarifying changes but modified expressly to omit reference to suits *by* the trustee.[6] But subsection e departs radically in form from the language used in subsection d as originally enacted and as amended. The subsection is entirely new.[7] Faced with the necessity of eliminating the questions of interpretation and opera-

either by or against the Trustee subsequent to the designated time. It does not follow from the fact that the Trustee is prohibited from bringing an action subsequent to that time that he is authorized to maintain an action prior thereto, irrespective of an applicable limitation statute. The provision is more for the protection of the Trustee than for his benefit and, in any event, is for the purpose of terminating his duties and responsibilities. As was said in *Charlesworth* v. *Hipsh, Inc.*, 8 Cir., 84 F. 2d 834, 837 in discussing this provision: "* * * Time in which the trustee may sue cannot be extended by provision in the Bankruptcy Act which purports only to limit the time within which a suit may be brought by or against him. * * *."

[6] Section 11d of the 1898 Act provided:

> "Suits shall not be brought by or against a Trustee of a bankrupt estate subsequent to two years after the estate has been closed."

As amended by the Chandler Act, Section 11d now provides:

> "Suits shall not be brought against a person who has acted as a receiver or trustee of a bankrupt estate upon any matter arising in connection with the administration thereof, subsequent to two years after the estate has been closed."

[7] Although the period of two years may have been adopted from the Bankruptcy Acts of 1841 and 1867, the permissive form of subsection 11e contrasts sharply with the definite prohibitions of those two statutes.

tion of subsection 11d of the 1898 Act outlined above, it was an obvious step for the draftsmen to revert to the laws of the several states as constituting the primary measure of limitation just as they would under the Rules of Decision statute, and to erect on that foundation the two-year provision as being the minimum time within which the trustee should be required to act. Under this new subsection it becomes plain that a trustee can bring a suit within two years after adjudication regardless of the expiration of the period of limitations fixed by State or Federal law either subsequent to the filing of the petition and prior to adjudication or prior to the lapse of two years after adjudication. By fixing two years after adjudication there can be no question but that the reopening of the case would not extend the time. There can be no invocation of the two-year period to bar claims or causes of action accruing subsequent to adjudication and otherwise suable because the two-year provision with its reference to "such further period as the Federal or State law may permit" purports not to impose a bar but rather merely to create a protective extension such as is often given under State law to administrators of estates of decedents.

D. **The legislative history shows that subsection 11e was throughout regarded not so much as a statute of limitations but primarily as tolling the running of the limitation otherwise applicable.** It is highly significant that in the development of subsection 11e it was treated by those concerned with its drafting as merely suspending the fall of the bar of the statute of limitations. Appended to one of the earlier drafts submitted by the National Bankruptcy Conference in May 1933 was a note which insofar as it related to subsection 11e stated (15 Doc., A. G. Comm. on Bank. Adm'n (2d Ser.) Doc. No. 5, p. 23):

> Consider * * * "(e)" in connection with McAllester's proposal that during the pendency of the bankruptcy proceedings and for the prosecution of

claims and demands for and against the bankruptcy estate local statutes of limitations shall be suspended.

Appended to a redraft of Section 11 by the National Bankruptcy Conference submitted to the House Judiciary Committee on April 22, 1935, was the following note (15 Doc., A. G. Comm. on Bank. Adm'n (2d Ser.) Doc. No. 8, p. 32):

The principle changes proposed in this section are:

A reduction in the period from two years to one within which suits may be brought against a person who has acted as the Trustee, with an extension of this limitation to receivers.

A new provision whereunder receivers and Trustees may bring action upon causes expiring by limitation under the law between the date of the filing of the petition and date of adjudication.

A new provision whereunder the operation of State statutes of limitation is suspended.

The second paragraph refers to subsection 11e and it is important to note therein the absence of any reference to a limiting effect in subsection 11e as contrasted with the direct reference in the first paragraph of the note respecting the limitation appearing in subsection 11d. The same note was appended to an analysis of H. R. 12889 (introduced by Congressman Chandler on May 28, 1936) prepared for the use of the House Judiciary Committee by the National Bankruptcy Conference (16 Doc., A. G. Comm. on Bank. (2d Ser.) Doc. No. 10, p. 35).

H. R. 6439 introduced on April 15, 1937 embodied subsection 11e substantially as it appeared in the earlier bill. On July 28, 1937 Mr. Chandler introduced H. R. 8046 as a substitute for H. R. 6439 in which subsections 11d and 11e were unchanged except that for the first time there appeared in subsection 11e the second sentence with which we are not here directly concerned. It is pertinent to note, however, that in urging the adoption of the second sentence of subsection 11e, at least insofar as it related to the pro-

visions of agreements, Mr. Teitlebaum, representing the members of the Bankruptcy Committee of the Association of the Bar of the State of New York, treated the first sentence of subsection 11e, not as creating, but rather as tolling the limitation period. After reading the first sentence of subsection 11e in the bill he said: (Hearings, H. Committee on the Judiciary, H. R. 6439 amended, re-introduced and reported as H. R. 8046, 75th Cong. 1st sess. (1937) p. 33-35):

> In other words, it tolls the statute of limitations against a receiver or Trustee and gives him a further opportunity to bring any action which the estate may have, which otherwise he may be debarred from bringing by reason of the operation of a Federal or State statute of limitations.
>
> • • • • • • • • • • •
>
> It tolls the statute for that period of time, in order to give an opportunity to the successors in interest, the receiver or Trustee, to take appropriate action.

The House report accompanying the bill was equally innocent of any reference to subsection 11e as establishing any period of limitations. It stated (H. Rept. No. 1409, 75th Cong. 1st sess. (1937) p. 20):

> A new provision in subdivision e permits receivers and trustees within two years after the adjudication to institute suits on claims against which the period of limitation fixed by Federal or State law had not expired at the time of the bankruptcy or within such further time as the Federal or State law may permit.

Bearing in mind that it was the purpose of subsection 11e to clarify ambiguities and resolve conflicts which had developed in the application of subsection 11d of the Bankruptcy Act, it seems clear that if Congress had intended that section 11e should provide a time within which trustees may sue causes of action created by the Bankruptcy Act different from the period applicable to those created

by statute or existing at common law, then it would have found words which clearly so provided and would have added to section 11e at the end of the first sentence, after the word "bankruptcy", some such language as the following:

> "provided that as to actions which did not exist prior to bankruptcy, but are created by this Act only, the trustee or receiver shall have only two years to institute proceedings after the date of adjudication.

It thus appears that the House committee which most intimately knew all phases of the Chandler Act regarded subsection 11e primarily as merely providing a minimum period—two years from adjudication—within which the trustee or receiver may institute proceedings.[8] Neither the language of the section nor any discovered intent or policy afford foundation for construing the subsection as cutting down the period of limitation fixed by other Federal or state law and which, under familiar principles and the Rule of Decisions statute, would control any action by the trustee were the Bankruptcy Act entirely silent on the matter. However, for clarity section 11e specifically affirms that the trustee is authorized to proceed "upon any claim" within "such further period of time as the Federal or State law may permit".

In conformity with the legislative history of the subsection, and giving proper scope to its plain language, the effect of subsection 11e is stated as follows in 1 Collier on Bankruptcy (14th ed.) sec. 11.13, pp. 1186-1188:

> Subdivision e operates as a statute of limitations on suits brought in behalf of the estate by the receiver or trustee. The language of the subdivision clearly indicates that it has reference to suits initiated sub-

[8] An obviously inaccurate and incomplete reference to subsection 11e in the Senate report does refer to it as fixing a period of limitations (S. Rept. No. 1916, 75th Cong. 3rd sess. (1938) p. 3).

sequent to the time of bankruptcy. If the federal or state period of limitation applicable to a claim has not run prior to the filing of the petition in bankruptcy, §11(e), which is in the nature of a special statute of limitations, is applicable and supersedes the state or federal statute of limitations to the extent that the trustee or receiver has at least two years from the date of adjudication in which to commence suit. Under former subdivision d, this point was subject to some confusion. * * * *In the event that the applicable state or federal statute is longer in duration than the two-year period specified in subdivision e, the subdivision provides that the receiver or trustee may sue "within such further period of time as the federal or state law may permit."* * *

It should be noted, however, that subdivision e has altered the span of time within which the receiver or trustee may bring suit as compared to former subdivision d. It is now provided that the time allowed is 'within two years subsequent to the *date of adjudication*", or such further period of time as the federal or state statute of limitations may permit. Former subdivision d allowed suit within two years after the estate was closed. Such a limitation was extremely indefinite and had no real connection with a suit which a receiver or trustee might institute on behalf of the estate.

The character of the suit or proceeding brought is immaterial, so long as it is "in behalf of the estate." (Emphasis supplied.)

In its fullness subsection 11e may properly be deemed to meet all the problems of interpretation that arose under the old law and to state the controlling law as to proceedings on behalf of the estate by the receiver or trustee on any claim which existed in favor of the bankrupt or a creditor, on any claim or cause of action created by the Bankruptcy Act and on any claim or cause of action accruing subsequent to adjudication. But to cover all, the subsection must be applied according to its terms and without

reading into it exceptions or limiting provisos foreign to its letter and plain intent.

5. **The question is important in the administration of the Bankruptcy Act and should be settled by this Court.** It is plain that the effect and operation of section 11e should be authoritatively determined, not only in the interest of uniformity, but to avoid the misleading of trustees and of creditors who may otherwise be deprived of the equality of distribution sought to be accomplished by section 60a. The importance of questions affecting the administration of the Bankruptcy Law has long been recognized by this Court. *Daniel* v. *Guaranty Trust Company of New York*, 285 U. S. 154; *American Surety Company of New York* v. *Marotta*, 287 U. S. 513; *Conrad, Rubin & Lesser* v. *Pender*, 289 U. S. 472.

The opinion in this case is notable for the utter lack of authority or reasoning to support the conclusion as well as for the frank admission "In fact we have found no case strictly in point (R. 23)."

The question is one which will frequently recur. The question here involved is not confined to bankruptcy estates in Illinois alone. On the contrary, a large number of the states have statutes comparable to the Illinois law establishing a period of more than two years within which causes of action not otherwise provided for by state law may be brought.[9]

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[9] Of the first 16 states, statutes of which were examined, ten have catch all statutes similar to that of Illinois which would plainly embrace actions to recover preferences such as that here involved. Cf. 2 Arizona Code Ann. (1939) § 29-206, 2 Arkansas Dig. Stats. (Pope, 1937) § 8938; California, Civ. Proc. Code (Deering, 1937) § 343; 7 Florida Stats. Ann. (1941) § 95.11(4); Idaho Ann. Code (1932) § 5-224; Indiana Stats. (Baldwin, 1934) § 62; Iowa Code (1939) § 11007(5); Kansas G. S. (1935) § 60-306; Kentucky Rev. Stats. (1942) § 413.160; Maine Rev. Stats. (1930) c. 95, § 97.

In view of the plain language of section 11e, the unreasoned nature of the decision below and the onerous burden which it places on trustees and creditors, it is submitted that the question is one requiring the exercise of the jurisdiction of this Court.

CONCLUSION.

For these reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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August, 1944.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 322

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., AN ILLINOIS CORPORATION, BANKRUPT,

Petitioner,

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION.

REPLY BRIEF FOR PETITIONER

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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONER

The Petition Is Plainly in Time

Respondent complains of the absence from the order extending time (R. 34) of a recital that the order was entered "for good cause shown," the statutory ground upon which the period for applying for writ of certiorari is authorized to be extended. 28 U. S. C., sec. 350.

The contention is frivolous. Examination of the records of this Court discloses that orders extending the period for applying for certiorari have for some time omitted the recital "for good cause shown." Aside from the fact that

the order is *ex parte*, it is difficult to perceive how a mere recital can add to, or its absence can detract from, the effect to be given to such an order.

No question of jurisdiction of the Justice to enter such an order is raised either as to parties or subject matter. The sole complaint is that omission of the formal recital makes the record inadequate to sustain jurisdiction of this Court to consider the petition. This overlooks the presumption of regularity which attaches to judicial orders as well as judgments. Every act of a court of competent jurisdiction, including orders as well as judgments, is presumed to have been rightly done until the contrary appears. *Voorhees* v. *Bank of United States*, 10 Pet. 449, 472. The representation of good cause made in the motion plainly conferred jurisdiction for when that was before the Justice it became his duty to determine whether or not good cause was shown; it was a subject for judicial action. *Grignon's Lessee* v. *Astor*, 2 How. 319, 339. Since there is no question as to the limited and special jurisdiction of the Justice to entertain the motion for extension of time, the same presumption of law arises that it was rightly exercised as prevails with reference to the action of a court of superior and general authority. *Comstock* v. *Crawford*, 3 Wall. 396, 403; *Simmons* v. *Saul*, 138 U. S. 439, 452. *Philadelphia and Trenton Railroad Company* v. *Stimpson*, 14 Pet. 448, 459; *Thompson* v. *Maxwell Grant Co.*, 168 U. S. 451, 463. Since respondent neither avers nor argues that good cause was not shown, the presumption that the Justice exercised his recognized power with due regard to the applicable statutory rule amply sustains the jurisdiction of this Court to consider the petition.

Respondent's Authorities Are Plainly Not in Point and Its Contentions Are All Founded on a Disregard of the Language of Section 11E.

The cogency of the authorities brought forward by respondent may be best judged by the fact that while they were all advanced in the court below, that court, although deciding for respondent, cited none of them.

1. Respondent's basic contention supports petitioner's interpretation of subsection 11e of the Chandler Act.— Respondent relies heavily on decisions prior to the passage of the Chandler Act to the effect that the time limitation set forth in subsection 11d of the Bankruptcy Act applied to causes of action created by the Bankrupty Act to the exclusion of all state laws (Resp. Br., pp. 9, 10, 11, 13). From this respondent concludes (p. 13):

> Congress by section 11e of the Chandler Act codified its concurrence that the limitation provisions contained in the Bankruptcy Act exclusively governed suits by the trustee to set aside voidable preferences * * *.

Petitioner, of course, has always recognized that the limitation provision contained in the Bankruptcy Act, section 11e, exclusively governs suits by the trustee to set aside voidable preferences. However, the provision in section 11e that the trustee may institute proceedings in behalf of the estate "within two years subsequent to the date of adjudication *or within such further period of time as the federal or state law may permit*" is a plain adoption by generic reference of the limitation provisions of the state statutes. *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, 85; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 391-392. The language of the state statute is thus given force by the federal law and is just as much a part of the limitation provisions contained in section 11e of the Bank-

ruptcy Act as if physically enacted in terms by the Congress. Cf. *Kendall* v. *United States*, 12 Pet. 524, 625; *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, 84-85. The five-year limitation period provided by the Illinois law is thus made an integral part of the second alternative clause of section 11e of the Bankruptcy Act as amended by the Chandler Act. Therefore, if full effect is given to respondent's proposition (Resp. Br., p. 13): "that the limitation provision contained in the Bankruptcy Act exclusively governed suits by the trustee to set aside voidable preferences," it follows, as petitioner contends, that the five-year period thus provided by section 11e applies.

Respondent, however, asserts, not only that section 11e of the Chandler Act codified Congressional concurrence that the limitation provisions of the Bankruptcy Act exclusively governed suits to set aside voidable preferences, but that Congress thereby "provided a period of two years subsequent to the date of adjudication to govern them" (Resp. Br., p. 13).

It is unnecessary to expand on the obvious fallacy in the contention, novel to say the least, that Congress, despite the fact that it has repealed the pertinent portions of section 11d (Section 4 of the Chander Act, June 22, 1938, c. 575 52 Stat. 840, 940) and even though it has enacted a new section 11e in entirely different language, is nevertheless to be regarded as having thereby indicated a purpose to codify prior decisions under the repealed portions of section 11d. It is sufficient to note that none of this argument can be extended to justify or in any way support the nullification of the specific language added by Congress in the alternate clause of section 11e: "or within such further period of time as the * * * state law may permit." 'Further" is obviously here used in the sense of "additional". It is therefore manifest that the limitation provision contained in section 11e allows to the trustee for the commencement of suits

to avoid preferences the period of two years or the period permitted by the state law, whichever is longer. Nothing in the prior statutes or in the decisions under them bears on the question; much less does it afford any ground for nullifying this limitation provision of the Bankruptcy Act itself.

2. No reason has been suggested for providing a period of limitation for suits by the trustee on causes of action created by the Bankruptcy Act shorter than that applying to suits by him on other causes of action.—By paraphrase of the language of *Bailey* v. *Glover*, 21 Wall. 342, dealing with the Bankruptcy Act of 1867, respondent argues that the Congress has prescribed that no suit on causes of action created by the Bankruptcy Act shall be commenced after two years subsequent to the adjudication in bankruptcy.

The Bankruptcy Acts of 1841 and 1867 contained limitation provisions different from each other and neither contained language comparable to that here involved.[1] Aside from the violence to the plain language of section 11c which it involves, respondent's contention advances no justifica-

[1] The Bankruptcy Act, August 19, 1841, sec. 8, c. 9, 5 Stat. 440, 446 provided:

> "and no suit at law or in equity shall, in any case, be maintainable by or against such assignee or by or against any person claiming an adverse interest touching the property and rights of property aforesaid, in any court whatsoever unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued."

The Bankruptcy Act of March 2, 1867, sec. 2, c. 176, 14 Stat. 517, 518, provided (R. S. sec. 5057):

> "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed."

tion for so differentiating between causes of action created by the Act and causes of action arising under state law. It is established that equality of participation among creditors is one of the primary objectives of bankruptcy administration and avoidance of preferences is one of the most important means of achieving that end. It would indeed be anomalous for Congress to bar suits on causes of action created by the Act and by Congress deemed essential to its operation while at the same time permitting to the trustee a longer period of limitation on causes of action arising under state law. If, for example, the trustee may, at any time within three years after discovery, sue to set aside a transfer in fraud of creditors under state law (cf. *First Presbyterian Church* v. *Rabbitt*, 118 F. 2d 732, 735), there is no reason to enforce a shorter period with respect to suits to avoid preferences.

Since the provisions of section 11e are in no way analogous to the limitation provisions of the earlier Bankruptcy Acts or to section 11d before amendment by the Chandler Act, decisions under them have no pertinence.

3. No Illinois decision affects the result in this case—Respondent invokes the presumption that the judges of the Circuit Court of Appeals are conversant with state law equally with the judges of this Court (Resp. Br., p. 8). It is plain, however, that the decision in the instant case went off on no interpretation of state law.

The case of *Handtoffski* v. *Chicago Union Traction Co.*, 274 Ill. 282, 286, is cited as *holding* that section 15 of the Illinois Limitations Act does not apply when a different limitation is prescribed by a federal statute (Resp. Br., p. 8). Reference is apparently intended to be made to the *obiter* statement in that decision to the effect that section 14 of the Illinois Limitations Act would be construed to fix a limitation for all personal injury actions at two years "unless a different limitation is fixed * * * under particular

statutes giving damages for personal injuries to certain classes of individuals, such as the Employers' Liability Act."

Obviously, the state court's reference is to the fact that the limitation fixed in the Federal Employers' Liability Act is an integral part of the substantive right, setting a limit to the obligation which the Act creates, and under well-established principles cannot be controverted or modified by a state statute of limitation. *Central Vermont Ry.* v. *White*, 238 U. S. 507, 511; *Atlantic Coast Line R. R.* v. *Burnette*, 239 U. S. 199, 201; *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633, 637; *Engel* v. *Davenport*, 271 U. S. 33, 38.

Here section 11e of the Bankruptcy Act as added by the Chandler Act, so far from setting up a *different* limitation period, adopts the time fixed in the state law as the applicable period. It results that the *dicta* of the state court has no bearing on, and cannot control, the effect of the federal statute here involved.

CONCLUSION

Upon analysis, the argument of respondent appears as barren of support in authority or logic as is the opinion of the court below.

Respectfully submitted,

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September, 1944.

No. 322

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., AN ILLINOIS CORPORATION, BANKRUPT,

Petitioner,

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 322

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., AN ILLINOIS CORPORATION, BANKRUPT, *Petitioner*,

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the United States District Court for the Southern District of Illinois (R. 9) is reported in 53 F. Supp. 265. The opinion of the circuit court of appeals (R. 20-23) is reported in 141 F. 2d 150.

Jurisdiction

The judgment of the circuit court of appeals sought to be reviewed was entered February 5, 1944 (R. 23). Petition

for rehearing seasonably filed by petitioner (R. 25) was denied on April 5, 1944 (R. 31). By order of Mr. Justice Murphy entered June 10, 1944, time within which to file petition for certiorari was extended to August 5, 1944 (R. 34). Petition for a writ of certiorari was filed August 5, 1944, and was granted October 9, 1944 (R. 35). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether an action to recover a preference under section 60b of the Bankruptcy Act is by the limitation prescribed by section 11e of the same Act, added by the Chandler Act of June 22, 1938, barred at the end of two years from the date of adjudication or is, as petitioner contends and as is specifically provided in section 11e, barred only at the end of the longer period provided by state law—in this case five years.

2. Whether the five-year period of limitation prescribed by the Illinois Statute of Limitations, secs. 12 and 15, constitutes the period of time permitted by State law and adopted by section 11e of the Bankruptcy Act as the limitation for the bringing of actions based on rights created by the Bankruptcy Act such as the trustee's right to recover a voidable preference under Section 60b.

Statutes Involved

Subsection 11e of the Bankruptcy Act, added by the Chandler Act, June 22, 1938, c. 575, sec. 1, 52 Stat. 840, 849 (11 U. S. C. sec. 29e) provides:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit,

institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. * * *[1]

The Illinois statute of limitations, Act of April 11, 1873, Laws 1873, p. 121 (Ill. Rev. Stats. (State Bar ed. 1943) c. 83, secs. 13-16) provides:

Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, except when a different limitation is prescribed by statute.

Sec. 13. Actions for slander or libel shall be commenced within one year next after the cause of action accrued.

Sec. 14. Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction or for seduction, or for criminal conversation, shall be commenced within two years after the cause of action accrued.

Sec. 15. Actions on *unwritten contracts, express or implied*, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and *all civil actions not otherwise provided*

[1] Prior to the passage of the Chandler Act, the relevant provision of the Bankruptcy Act was (11 U. S. C. Sec. 29(d)):

Sec. 11d. Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

The Chandler Act amended this subsection so as to narrow its application to suits *against* the trustee (11 U. S. C. Sec. 29(d)):

Sec. 11d. Suits shall not be brought against a person who has acted as a receiver or trustee of a bankrupt estate, upon any matter arising in connection with the administration thereof, subsequent to two years after the estate has been closed.

Suits *by* the trustee are covered by Section 11e added by the Chandler Act.

for, shall be commenced within five years next after the cause of action accrued. (Emphasis supplied.)

Statement

The complaint alleged, and the defendant's motion to dismiss (R. 7) admitted the pertinent facts:

On April 11, 1938, N. L. Rogers & Company, Inc., an Illinois corporation, was adjudged a bankrupt in the District Court of the United States for the Southern District of Illinois, Southern Division (R. 2). Petitioner was elected trustee on May 25, 1938 and immediately thereafter qualified as such trustee (R. 2).

On March 3, 1942, more than two, and less than five, years after the adjudication, Roscoe Herget, the petitioner, as Trustee in Bankruptcy of the Rogers Company, filed his complaint under Section 60b of the Bankruptcy Act (11 U. S. C. Sec. 96(b)) in the same court against the respondent, The Central National Bank & Trust Company of Peoria, a national banking corporation, to recover preferences amounting to $308,122.58 alleged to have been given by the bankrupt to the respondent at a time when the bankrupt was insolvent and the defendant had reasonable cause to believe the bankrupt to be insolvent, all within four months prior to the filing of the petition in bankruptcy, April 11, 1938 (R. 2-4).

The defendant (respondent herein) moved to dismiss the complaint on the ground that because the suit had been instituted at a date more than two years subsequent to the date of the adjudication in bankruptcy, it was barred by the provisions of section 11e of the Bankruptcy Act as amended by the Chandler Act of June 22, 1938, 52 Stat. 840, 849 (R. 7-8).

The district court held that the cause of action accrued with the appointment and qualification of the trustee, and

because it arose under the Bankruptcy Act, it was barred by section 11e upon the expiration of two years from the date of appointment of the trustee and entered its order accordingly (R. 9-11). Petitioner appealed.

On February 5, 1944, the circuit court of appeals filed its opinion, holding petitioner's cause of action barred by the two-year clause of section 11e and not within the operation of the alternative clause of the same subsection: "or within such further period of time as the * * * State law may permit," so as to make applicable the five-year period permitted by the State Act, secs. 12, 15, Ill Rev. Stats. (State Bar ed. 1943) c. 83, secs. 13, 16, p. 2012 (R. 20-23). Judgment of affirmance was entered the same day (R. 23). Petition for rehearing was denied April 5, 1944 (R. 31).

Specifications of Error

The United States Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that under subsection 11e of the Bankruptcy Act, action to recover preferences is barred unless brought within two years subsequent to the date of adjudication.

2. In failing to hold that under subsection 11e of the Bankruptcy Act the period of limitations on actions to recover preferences in the Federal courts for Illinois is the five-year period provided by section 15 of the Illinois Statute of Limitations and adopted by reference by subsection 11e.

3. In holding that the clause of the first sentence of subsection 11e permitting institution of proceedings on any claim "within such further period of time as the Federal or State law may permit" is inapplicable to actions to recover preferences.

4. In interpolating the language "permitting or creating the cause" in the second alternative clause of the first sentence of section 11e so as to make it read "within such further period of time as the Federal or State law [permitting or creating the cause] may permit."

5. In holding that "since it is the Bankruptcy Act which creates the cause, it must provide the period for bringing it."

6. In holding that "there is no applicable state statute for the reason that the cause of action was not created by the State."

7. In failing to hold that the alternative clause of the first sentence of subsection 11e applies, according to its terms, to all proceedings by the trustee in behalf of the estate upon any claim regardless of the law creating such claim.

8. In holding that the clause of section 11e expressly adopting the limitation fixed by State or Federal law does not extend to causes of action created by the Bankruptcy Act.

Summary of Argument

Taken in its ordinary and received import, the language of Section 11e of the Bankruptcy Act requires reference to the state statute of limitations for ascertainment of the period of limitation on suits arising under Section 60b of the Bankruptcy Act. Sections 12 and 15 of the Illinois statute of limitations plainly allow the trustee five years from the date the cause of action accrued within which to bring suit. The cause of action here accrued not earlier than April 11, 1938 and suit brought by the trustee on March 3, 1943 was plainly within time.

The legislative history and other antecedents through which the development of Section 11e of the Bankruptcy

Act may be traced confirm that the section means exactly what it says. Section 11e acknowledges the applicability of federal or state statutes of limitation and merely guarantees that the trustee shall have a period of at least two years from the date of adjudication within which to institute proceedings on behalf of the bankrupt estate.

The construction of Section 11e by the circuit court of appeals perverting the language and purpose of the statute and treating the two-year protective clause as a statute of limitations with respect to causes of action arising under the Bankruptcy Act ignores the Rules of Decision statute (R. S. sec. 721) and is founded on the erroneous propositions of law that a federal statute creating a cause of action must also provide the period for bringing it, and that state statutes of limitation cannot apply to causes of action created by federal statute. *Campbell* v. *Haverhill*, 155 U. S. 610; *Rawlings* v. *Ray*, 312 U. S. 96.

Because no legitimate reason has ben advanced for departing from the plain language of Section 11e, it should be enforced according to its terms and the judgment below reversed.

Argument

The facts alleged in the complaint are admitted by the motion to dismiss. The cause of action arose on April 11, 1938, the date of adjudication (R. 27). Suit was filed by the trustee March 3, 1943, more than two, but less than five, years subsequent to that date (R. 2).

The trustee relies on the provisions of section 11e of the Bankruptcy Act as amended (11 U. S. C. sec. 29e):

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation

> fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy.

And the trustee further relies on sections 12 and 15 of the Illinois Statute of Limitations (Ill. Rev. Stats. (State Bar ed. 1943) c. 83, secs. 13 and 16):

> Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, except when a different limitation is prescribed by statute:
>
> Sec. 15. Action on unwritten contracts * * * and, all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.

Because section 11e provides that the trustee may institute proceedings in behalf of the estate upon "any claim" within two years subsequent to the date of adjudication *or within such further period of time as the * * * State law may permit*, the trustee contends that suit brought within the five-year period fixed by the Illinois law, and by section 11e adopted by reference, is within time.

The circuit court of appeals placed the ground of its affirmance of the trial court squarely on a purported paraphrase of the statute involving a violent interpolation of language so as to narrow the ambit of the clause "within such further period of time as the Federal or State law may permit" and make the period established by state law operative only where such further period is "provided by the statute permitting or creating the cause" (R. 22). A fundamental error also appears in the court's holding (R. 22): "since it is the Bankruptcy Act which creates the cause of action here, it must provide the period for bringing it * * *."

I. The Meaning of the Statutes Is Clear and They Require No Construction

The basic error in this case lies simply in the failure of the courts below to concede to Congress the ability to state the legislative purpose and in their failure to follow the plain language of the statute notwithstanding the absence of any precedent or legislative history to justify departure from the letter of the law.

A. **Section 11e of the Bankruptcy Act is a statute of extension and, save for its specific two-year enlargement of time, plainly makes suits by the trustee subject to federal and state statutes of limitation.**—The language of section 11e is clear and effect may be given to all its parts without necessity for construction or interpolation such as that in which the court below engaged. When the meaning of a statute is plain, there is no room for interpretation. *Lake County* v. *Rollins*, 130 U. S. 62; *Lewis* v. *United States*, 92 U. S. 618. Section 11e obviously authorizes suit by the receiver or trustee within two years subsequent to date of adjudication *or* within the period of time permitted by other federal or state law, whichever is longer, with the proviso that no claim already barred at the date of the petition shall be revived.[2] The time provision in the first sentence of section 11e is unitary although stated in the alternative; the two alternative clauses are unseparated even by a comma and obviously fix a single mode of measurement to be applied to "any claim." As was stated by this

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[2] The concluding and modifying clause, "against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition" obviously has only the same effect as though it were in specific proviso form such as was used in the Bankruptcy Act of 1867, Sec. 2 (14 Stat. 518):

> "*Provided*, that nothing herein contained shall revive a right of action barred at the time such assignee is appointed."

Court in *United States* v. *Goldenberg*, 168 U. S. 95, 102-103:

> The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent.

No reason for departure from the general rule was suggested by the court below. Taken in their ordinary and received import and according to accepted rules of grammar and punctuation the words of subsection 11e require reference to the state statute of limitations to ascertain the time there permitted for the bringing of such a suit. If longer than two years, the trustee is to have the benefit of it.

It is therefore submitted that the meaning of Section 11e is plain without necessity for construction.

B. **The Illinois state law permits suit on this claim at any time within five years after the cause of action accrues.**— The Illinois Statute of Limitations (Illinois Rev. Stats. (State Bar ed.), c. 83, provides:

> Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, *except when a different limitation is prescribed by statute:* * * *
>
> Sec. 15. Actions on unwritten contracts, express or implied * * * and all civil actions *not otherwise provided for*, shall be commenced within five years next after the cause of action accrued.

Respondent in the court below argued that within the meaning of the italicized clauses, section 11e prescribed "a different limitation" and this action is, thus "otherwise provided for."

The respondent's theory leads only into a sort of statutory and endless renvoi which can be resolved only by resolving the main question—the meaning of section 11e. For respondent asserts that the initial reference in section 11e to the state statute brings up against the provision in section 12 of the state law: "except when a different limitation is prescribed by statute." Respondent takes this as a re-reference to section 11e of the Bankruptcy Act and on the re-reference selects the two-years clause as constituting a "different limitation" "prescribed by statute," this time entirely ignoring the clause which refers to the state law. The respondent's theory thus involves a circular reasoning which cannot be accepted because of its absurdity. For there is no more reason on the re-reference for thus ignoring and nullifying the part of section 11e which adopts the further period permitted under state law than for so doing on the initial consideration of section 11e. Cf. 1 Beale, Conflict of Laws, sec. 7.3, pp. 56-57.

When section 11e provides for "such further period of time as the * * * State law may permit" it is difficult to comprehend how it may be regarded as providing "a different limitation" or as making the action one "otherwise provided for" within the meaning of those clauses as used in the sections of the Illinois statutes above quoted. Even if "statute" as used in Section 12 of the Illinois law be deemed to include Federal statutes, it still is clear that "a different limitation is [not] prescribed by statute" because the Federal statute expressly prescribes two years "or within such further period of time as the Federal or State law may permit". In section 15 of the Illinois law, even if the phrase "not otherwise provided for" be deemed

to contemplate Federal as well as state statutes, it is nevertheless clear that in section 11e the proceeding under section 60b is not "otherwise provided for." The limitation in section 11e of the Bankruptcy Act must necessarily be that of the two alternative periods which is the longer. Since the longer alternative results from the reference adopting the five-year period provided in section 15 of the state law, it cannot reasonably be said that limitation on proceedings under section 60b of the Bankruptcy Act is "otherwise provided for" within the meaning of section 15 of the Illinois statute of limitations.

Read separately, the meaning of the two statutes, federal and state, is clear. Taken together, as required by the reference in section 11e of the Bankruptcy Act, they plainly provide that the proceeding by the trustee on a cause of action arising under section 60b may be brought at any time within five years after the cause of action accrued. Certainly, the cause of action under section 60b could not have accrued earlier than April 11, 1938, the date of the voluntary petition and adjudication (R. 2). If the statutes be given their plain meaning, therefore, the complaint filed and served on March 3, 1943 (R. 4-5) was in time and was wrongly dismissed.

II. The History and Objectives of Subsection 11e Require That It Be Applied in Accordance With Its Plain Letter.

The difficulties it was intended to obviate and its legislative history all show that subsection 11e was drawn having due regard to the Rules of Decision statute and that it was intended primarily merely to postpone for two years the falling of the bar of the statutes of limitation, federal or state, which, in the absence of specific limitation in the Bankruptcy Act, would apply to all suits brought by the

trustee and in some instances might bar action by the trustee before he had had opportunity to act or before the expiry of the two-year period contemplated as an essential minimum.

A. **The language of Section 11e is the result of careful and prolonged study by experts in the field.**—Section 11e as added by the Chandler Act represents no hurried legislative action to meet problems only dimly perceived. In large part it represents the work of the National Bankruptcy Conference, an unofficial body organized in 1932 and made up of various groups interested in the perfecting of the Act, including the American Bar Association, the Commercial Law League, the American Bankers Association and many others. The drafting committee[3] of the Conference prepared and discussed seven successive drafts of a bill directed toward a general overhauling of the 1898 Act (Hearings, H. Committee on the Judiciary, H. R. 6439, amended, re-introduced and reported as H. R. 8046, June 1937, p. 2). For at least two years other numerous and eminentemembers of the legal profession, referees in bankruptcy, specialists in bankruptcy, judges and professors gave their best efforts to the drafting of this law. The House Judiciary Committee worked on the bill for a period in excess of four years (81 Cong. Rec., Pt. 8, pp. 8646-8647 (1937)).

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[3] The drafting committee included such men as:

Paul H. King, Chairman, member of the Advisory Committee on Commercial Law and Bankruptcy, American Bar Association, Chairman of the Committee on Uniformity of Practice, National Association of Referees in Bankruptcy, Detroit, Michigan.

Carl D. Friebolin, Chairman, Committee on Legislation, National Association of Referees in Bankruptcy, Cleveland.

James A. McLaughlin, Harvard Law School.

Jacob I. Weinstein, member, Bankruptcy Committee, Commercial Law League of America, Philadelphia, Pa. (16 Doc., A. G. Comm. on Bank. Admn. (2d Ser.) Doc. No. 10, p. vi).

B. **Section 11e was addressed to specific problems.**— Subsection 11e is not an amendment of subsection 11d. On the contrary, it is an entirely new subsection. We recognize, therefore, that little or no direct assistance in the interpretation of subsection 11e is to be obtained by reference to decisions construing subsection 11d of the 1898 Act or the provisions as to limitations contained in section 2 of the Bankruptcy Act of 1867. The decisions under section 11d of the 1898 Act are helpful, however, insofar as they point out the ambiguities and moot the questions which were sought to be remedied by passage of subsection 11e. The specialists who had to do with the drafting were thoroughly conversant with these decisions and, of course, addressed their efforts to the problems presented by them:

(1) On its face the statute was ambiguous because of its reference to "two years after an estate has been closed." See 6 J. N. A. Referees Bank. 61, 65; S. Hearings, Subcommittee of the Committee on the Judiciary, S. 3866, 77th Cong., 1st sess. (1932) pp. 932-933; 9 Doc., A. G. Comm. on Bank. Adm'n (2d Ser.) Doc. No. 1.

(2) Question had arisen as to whether re-opening and again closing the estate extended the time. *Bilafsky* v. *Abraham*, 183 Mass. 401 (1903); *Kinder* v. *Scharff*, 231 U. S. 517 (1913).

(3) The decisions were in conflict as to whether the statute extended the period fixed by state law. 6 J. N. A. Referees Bank. 61, 65. See e.g. *Davis* v. *Willey*, 273 Fed. 397 (C. C. A. 9, 1921); *Isaacs* v. *Neece*, 75 F. 2d 846, 850 (C. C. A. 5, 1935). It had been specifically held that because subsection 11d was in the form of a *prohibition* and purported only to limit the time within which a suit could be brought, it could not be construed to *extend* the period

fixed by State law. *Charlesworth* v. *Hipsh*, 84 F. 2d 834, 837 (C. C. A. 8, 1936).[4]

(4) It had also been indicated that because the trustee's title did not vest until date of adjudication, the trustee could not sue on a cause of action barred as of that date. *In Re Dunavant*, 96 Fed. 542; *Harrod* v. *Farrar*, 68 Kan. 153, 157 (1903); *Garland* v. *Arrowood*, 172 N. C. 591, 593 (1916).

Most of these ambiguities and problems had been recognized as early as 1930. In September 1931, the committee on legislation of the National Association of Referees in Bankruptcy recommended a number of changes in the Act. In recommending amendment of subsection 11d so as to make it read approximately as does the first sentence of subsection 11e as finally enacted,[5] that committee

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[4] In construing subsection 11d before its amendment, this same distinction between *limitation* or *prohibition* as contrasted with *extension* was followed as late as 1941 in *Nairn* v. *McCarthy*, 120 F. 2d 910, 912 (C.C.A. 7). Judge Major in that case held:

> "As we read the provision, however, it does not grant an extension of time, but is a prohibition against the institution of actions either by or against the Trustee subsequent to the designated time. It does not follow from the fact that the Trustee is prohibited from bringing an action subsequent to that time that he is authorized to maintain an action prior thereto, irrespective of an applicable limitation statute. The provision is more for the protection of the Trustee than for his benefit and, in any event, is for the purpose of terminating his duties and responsibilities. As was said in *Charlesworth* v. *Hipsh, Inc.*, 8 Cir., 84 F. 2d 834, 837 in discussing this provision: '* * * Time in which the trustee may sue cannot be extended by provision in the Bankruptcy Act which purports only to limit the time within which a suit may be brought by or against him. * * *'"

[5] The suggestion as to the form of amendment was as follows (6 J. N. A. Referees Bank. 61, 65):

> "Amend § 11(d) pertaining to limitations of actions by or against the trustee to read as follows:
>
> "'§ 11(d). Suits shall not be brought by ("or against" omitted) a trustee of a bankrupt estate subsequent to two years after adjudication of the bankrupt, where the period of limitation fixed by state law has not expired at the time of the filing of the petition; unless at the expiration of such period of two years, the period of limitation fixed by state law has not expired, in which event the limitation fixed by state law shall control.
>
> "'§ 11(e). Suit shall not be brought by (or against) a trustee of an bankrupt estate subsequent to two years after an estate has been closed.'"

said (6 J. N. A. Referees Bank. 61, 65):

> Decision under this section are in hopeless confusion. Question arises why should the trustee bring a suit after the estate has been closed when he is *functus officio*. Question also arises whether this means two years after the case has been reopened and closed. There is some doubt in some of the cases as to whether the state law limitation controls in some instances, or whether this is an exclusive limitation.[6] As amended it becomes plain that a trustee can bring a suit within two years after adjudication regardless of the expiration of the statute of limitations within that period. In other words, if the statute has not run at the time *the petition* in bankruptcy is filed, the trustee has two years after *adjudication* to bring suit. By fixing two years after adjudication, there can be no question but that the reopening of a case would not extend the time. *Moreover, if the statute of a state provides a longer period, the provision as amended would not reduce the period.*

At the annual conference of the National Association of Referees in Bankruptcy in 1932 a report of the Committees on Legislation and Uniformity of Practice submitted a number of recommendations as to amendments, included in which was the suggestion that section 11(d) be amended to read (7 J. N. A. Referees Bank. 3, 6-7):

> Suits shall not be brought by (or against) a receiver or a trustee of a bankrupt estate subsequent to two years after (an estate has been closed) the filing of the petition where the period of limitation fixed by state law, if any, has not expired at the time of the filing of the petition; unless, at the expiration of two years,

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[6] Compare *Schreck* v. *Hanlon*, 66 Neb. 451, 453 (1902); *Shelton* v. *Parker*, 66 Neb. 610, 628-631 (1902); *Fuller* v. *Rock*, 125 Ohio State 36 (1932); *Isaacs* v. *Neece*, 75 F. 2d 846, 850 (C.C.A. 5, 1935) with *Davis* v. *Willey*, 273 Fed. 397 (C.C.A. 9, 1921); *Silverman* v. *Christian*, 123 N. J. Eq. 506 (Ch. 1938).

the period of limitation fixed by state law has not expired, in which event the limitation fixed by state law shall control.

In the same year in the course of hearing on the abortive Hastings-Michener bill which included no amendment of section 11(d), Mr. Reuben G. Hunt, Esq., an eminent bankruptcy practitioner of Los Angeles stated (S. Hearings, Subcommittee of the Committee on the Judiciary, S. 3866, 72d Cong., 1st sess. (1932) pp. 932-933):

> Section 11-d is ambiguous. It provides that suits shall not be brought by a trustee subsequent to two years after an estate has been closed. This really does not mean anything because when an estate is closed the trustee becomes officially dead. The idea is to extend the time within which the trustee may commence suit, although, if there were no bankruptcy, the time limit in which to commence a similar suit by the bankrupt himself was about to expire at the time of the bankruptcy, or did expire shortly after bankruptcy. This section can be amended by providing that suits shall not be brought subsequent to two years after the adjudication, where the state statute of limitation has not expired at the time of the filing of the petition, unless at the end of such two years the state limitation has not expired, in which event the state limitation shall control.

In his summary of advocated changes submitted at the same hearing Mr. Hunt suggested (Id., p. 988):

> Strike out subdivision (d) of section 11 as it is presently constituted and insert in lieu thereof the following:
>
> "Suits shall not be brought by a receiver or trustee of a bankrupt estate subsequent to two years after the adjudication of the bankrupt, where the period of limitation fixed by state law, if any, has not expired at the time of the filing of the petition unless at the ex-

piration of such period of two years the period of limitation fixed by state law has not expired, in which event the limitation fixed by state law shall control."

These historical antecedents of section 11e as finally incorporated and enacted in the Chandler Act are important because of the prominent part played by the National Association of Referees in Bankruptcy in the work of the National Bankruptcy Conference and because Mr. Hunt was one of the draftsmen on the drafting committee of the latter body which contributed so much to the writing of the Chandler Act.

C. **Section 11e, drafted and construed solely as a statute of extension, solved the problems presented.**—No substantial change of subsection 11d, insofar as it operated as a statute of limitations barring suit against the trustee, was deemed desirable. Therefore, it was left in its prohibitory form with certain clarifying changes but modified expressly to omit reference to suits *by* the trustee.[7] But subsection e departs radically in form from the language used in subsection d as originally enacted and as amended. The subsection is entirely new.[8] Faced with the necessity of eliminating the questions of interpretation and operation of subsection 11d of the 1898 Act outlined above, it was an obvious step for the draftsmen, as had the earlier proponents of amendment, to revert by reference to the laws of the several states as constituting the primary measure of limitation just as they would under the Rules of Decision statute, and to erect on that foundation the two-year provision as being the minimum time within

[7] See fn. 1, supra, p. 3.

[8] Although the period of two years may have been adopted from the Bankruptcy Acts of 1841 and 1867, the permissive form of subsection 11e contrasts sharply with the definite prohibitions of those two statutes.

which the trustee should be required to act. Under this new subsection it becomes plain that a trustee can bring a suit within two years after adjudication regardless of the expiration of the period of limitations fixed by State or Federal law either subsequent to the filing of the petition and prior to adjudication or prior to the lapse of two years after adjudication. By fixing two years after adjudication there can be no question but that the reopening of the case would not extend the time. There can be no invocation of the two-year period to bar claims or causes of action accruing subsequent to adjudication and otherwise suable because the two-year provision with its reference to "such further period as the Federal or State law may permit" purports not to impose a bar but rather merely to create a protective extension such as is often given under State law to administrators of estates of decedents. Cf. New York Civil Practice Act, Sec. 20; Ill. Rev. Stats. (State Bar ed. 1943) c. 83, Sec. 20; Wood on Limitations (4th ed.) Sec. 196, pp. 919-921.

Because it is purely a statute of extension, Section 11e is not to be construed to cut down the period within which suit might otherwise be brought.

D. **The legislative history shows that subsection 11e was throughout regarded not so much as a statute of limitations but primarily as establishing a minimum period for proceedings by the trustee despite the running of the period of limitation otherwise applicable.**—It is highly significant that in the development of subsection 11e it was treated by those concerned with its drafting as merely suspending the fall of the bar of the statute of limitations. Appended to one of the earlier drafts submitted by the National Bankruptcy Conference in May 1933 was a note

which insofar as it related to subsection 11 stated (15 Doc., A. G. Comm. on Bank. Adm'n (2d Ser.) Doc. No. 5, p. 23):

> Consider * * * "(e)" in connection with Referee McAllester's[9] proposal that "during the pendency of the bankruptcy proceedings and for the prosecution of claims and demands for and against the bankruptcy estate local statutes of limitations shall be suspended."

Appended to a redraft of Section 11 by the National Bankruptcy Conference submitted to the House Judiciary Committee on April 22, 1935, was the following note (15 Doc., A. G. Comm. on Bank. Adm'n (2d Ser.) Doc. No. 8, p. 32):

> The principle changes proposed in this section are:
>
> A reduction in the period from two years to one within which suits may be brought against a person who has acted as the Trustee, with an extension of this limitation to receivers.
>
> A new provision whereunder receivers and Trustees may bring action upon causes expiring by limitation under the law between the date of the filing of the petition and date of adjudication.
>
> A new provision whereunder the operation of State statutes of limitation is suspended.

The first and third paragraphs refer to subsections 11d and 11f respectively. The second paragraph refers to subsection 11e and it is important to note therein the absence of any reference to a limiting effect in subsection 11e as contrasted with the direct reference in the first paragraph of the note respecting the limitation appearing in subsection 11d. The same note was appended to an analysis of H. R. 12889 (introduced by Congressman Chandler on May 28, 1936) prepared for the use of the House Judiciary Com-

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[9] The reference apparently is to Sam J. McAllester, Esq., at that time referee in bankruptcy for the District Court for the Eastern District of Tennessee.

mittee by the National Bankruptcy Conference (16 Doc., A. G. Comm. on Bank. (2d Ser.) Doc. No. 10, p. 35).

H. R. 6439 introduced on April 15, 1937, embodied subsection 11e substantially as it appeared in the earlier bill. On July 28, 1937 Mr. Chandler introduced H. R. 8046 as a substitute for H. R. 6439 in which subsections 11d and 11e were unchanged except that for the first time there appeared in subsection 11e the second sentence with which we are not here directly concerned. It is pertinent to note, however, that in urging the adoption of the second sentence of subsection 11e, at least insofar as it related to the provisions of agreements, Mr. Teitlebaum, representing the members of the Bankruptcy Committee of the Association of the Bar of the State of New York, treated the first sentence of subsection 11e, not as creating, but rather as tolling the limitation period. After reading the first sentence of subsection 11e in the bill he said: (Hearings, H. Committee on the Judiciary, H. R. 6439 amended, re-introduced and reported as H. R. 8046, 75th Cong. 1st sess. (1937) p. 33-35):

> In other words, it tolls the statute of limitations against a receiver or Trustee and gives him a further opportunity to bring any action which the estate may have, which otherwise he may be debarred from bringing by reason of the operation of a Federal or State statute of limitations.
>
> • • • • • • •
>
> It tolls the statute for that period of time, in order to give an opportunity to the successors in interest, the receiver or Trustee, to take appropriate action.

As pointed out by Mr. Teitlebaum, the second sentence of subsection 11e accomplishes the same result as to matters other than causes of action.

The House report accompanying the bill was equally innocent of any reference to subsection 11e as establishing

any period of limitations. It stated (H. Rept. No. 1409, 75th Cong. 1st sess. (1937) p. 20):

> A new provision in subdivision e permits receivers and trustees within two years after the adjudication to institute suits on claims against which the period of limitation fixed by Federal or State law had not expired at the time of the bankruptcy or within such further time as the Federal or State law may permit.

Bearing in mind that it was the purpose of subsection 11e to clarify ambiguities and resolve conflicts which had developed in the application of subsection 11d of the Bankruptcy Act, it seems clear that if Congress had intended that section 11e should provide a time within which trustees may sue causes of action arising under the Bankruptcy Act different from the period applicable to those arising under other statutes or at common law, then it would have found words which clearly so provided and would have added to section 11e at the end of the first sentence, after the word "bankruptcy," some such language as the following:

> provided that as to actions which did not exist prior to bankruptcy, but are created by this Act only, the trustee or receiver shall have only two years to institute proceedings after the date of adjudication.

It thus appears that the House committee which most intimately knew all phases of the Chandler Act regarded subsection 11e primarily as merely providing a minimum period—two years from adjudication—within which the trustee or receiver may institute proceedings.[10] Neither the language of the section nor any discovered intent or policy afford foundation for construing the subsection as cutting down the period of limitation fixed by other Fed-

[10] An obviously inaccurate and incomplete reference to sub-section 11e in the Senate report does refer to it as fixing a period of limitations (S. Rept. No. 1916, 75th Cong. 3rd sess. (1938) p. 2).

eral or state law and which, under familiar principles and the Rule of Decisions statute, would control any action by the trustee were the Bankruptcy Act entirely silent on the matter. However, for clarity section 11e specifically affirms that the trustee is authorized to proceed "upon any claim" within "such further period of time as the Federal or State law may permit".

In conformity with the legislative history of the subsection, and giving proper scope to its plain language, the effect of subsection 11e is stated as follows in 1 Collier on Bankruptcy (14th ed.) sec. 11.13, pp. 1186-1188:

> Subdivision e operates as a statute of limitations on suits brought in behalf of the estate by the receiver or trustee. The language of the subdivision clearly indicates that it has reference to suits initiated subsequent to the time of bankruptcy. If the federal or state period of limitation applicable to a claim has not run prior to the filing of the petition in bankruptcy, § 11(e), which is in the nature of a special statute of limitations, is applicable and supersedes the state or federal statute of limitations to the extent that the trustee or receiver has at least two years from the date of adjudication in which to commence suit. Under former subdivision d, this point was subject to some confusion. • • • *In the event that the applicable state or federal statute is longer in duration than the two-year period specified in subdivision e, the subdivision provides that the receiver or trustee may sue "within such further period of time as the federal or state law may permit."* • • •
>
> It should be noted, however, that subdivision e has altered the span of time within which the receiver or trustee may bring suit as compared to former subdivision d. It is now provided that the time allowed is 'within two years subsequent to the *date of adjudication*", or such further period of time as the federal or state statute of limitations may permit. Former subdivision d allowed suit within two years after the estate was closed. Such a limitation was extremely

indefinite and had no real connection with a suit which a receiver or trustee might institute on behalf of the estate.

The character of the suit or proceeding brought is immaterial, so long as it is "in behalf of the estate." (Emphasis supplied.)

Confirmation of the view that, so far as applicability of Federal or State statutes of limitation are concerned, section 11e makes no differentiation between causes of action arising under the Bankruptcy Act and other causes is found in Weinstein, The Bankruptcy Law of 1938, p. 41[11]:

A receiver or trustee may proceed upon a claim of the estate, if not outlawed at the date of bankruptcy, within two years after the date of adjudication. However, if the period of limitation under applicable Federal or State law extends for a longer time, then such longer time shall be available to the receiver or trustee.

This [subsection 11e] is a new subdivision which is made up of two provisions. The first provision has been derived from the old subd. d, but has been revised to include a receiver and modified to reduce the period of limitation in respect to suits by a receiver or trustee from two years after the date of *closing the estate* to two years after the date of *adjudication*. The date of the closing of an estate bears no logical relation to the time for the commencement of suits by a receiver or trustee and, furthermore, it is too uncertain. Where, however, a longer period than two years after the date of adjudication is available under applicable Federal or State law, such longer period shall apply.

In its fullness subsection 11e may properly be deemed to meet all the problems of interpretation that arose under the old law and to state the controlling law as to proceedings on behalf of the estate by the receiver or trustee on any claim which existed in favor of the bankrupt or a cred-

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[11] See fn. 3, supra, p. 13.

itor, on any claim or cause of action created by the Bankruptcy Act and on any claim or cause of action accruing subsequent to adjudication. But to cover all, the subsection must be applied according to its terms and without reading into it exceptions or limiting provisos foreign to its letter and plain intent.

III. The Opinion of the Circuit Court of Appeals Is Plainly Erroneous

After attributing to petitioner an involved interpretation of the applicable state statutes for which there is no support in the record or the briefs, the court below found the meaning of subsection 11e "quite simple" but only after adding to that subsection a clause which radically changes the enactment of Congress (R. 22).

A. **The court below erred in adding words that substantially change the meaning of the statute.**—Admitting that no case was strictly in point (R. 23), and without suggesting any other authority, justification or necessity, the court, by a judicial amendment of section 11e interpolated the following italicized language so as to make the section read:

> Section 11e. A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law *creating the cause of action* may permit, institute proceedings in behalf of the estate upon any claim * * *.

There is plainly no basis for this interpolation by the court below. None has been suggested, and the legislative history gives rise to no inferences upon which it may be sustained. Section 11e, by reference to the state laws, makes the alternative period of limitations, the five-year period allowed by state law, just as much an integral part of the limitation provisions of section 11e of the Bankruptcy Act as if physically enacted in terms by Congress.

Cf. *Kendall* v. *United States*, 12 Pet. 524, 625; *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, 84-85.

However, the Circuit Court of Appeals purports to justify elimination of consideration of this alternative longer period of limitation under the state law by invoking a supposed rule that the statute which creates a cause of action must provide the period for bringing it and "there is no applicable state statute for the reason that the cause of action was not created by the state."

B. **The decision below proceeds on the basically erroneous premise that the federal statute creating a right must also provide the applicable period of limitations.**—The opinion of the court holds (R. 22):

> Since it is the Bankruptcy Act which creates the cause of action here, it *must* provide the period for bringing it, and in the absence of other provisions, the two-year one applies. • • •
>
> • • • *There is no applicable state statue for the reason that the cause of action was not created by the state.* • • • (Emphasis supplied.)

These propositions are plainly erroneous. It is well recognized that causes of action are frequently created by federal law without specific prescription of periods of limitation for the enforcement thereof. It is also established that when a cause of action arises under a federal statute containing no provision for any period of limitation, the result is to make operative the Rules of Decision Statute, 28 U. S. C. sec. 725, under which the state statute of limitations will necessarily control. *Campbell* v. *Haverhill*, 155 U. S. 610, 614-616; *McClaine* v. *Rankin*, 197 U. S. 154, 158; *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, 397; *Rawlings* v. *Ray*, 312 U. S. 96; *Williamson* v. *Columbia Gas & Electric Corporation*, 110 F. 2d 15 (C. C. A. 3, 1940) cert. denied 310 U. S. 639.

Perusal of the opinion makes it clear that the decision is founded upon this misconception of elemental law in clear conflict with the decisions of this Court. Since the rule invoked by the circuit court of appeals to eliminate the reference in section 11e to the "further period" under state law is non-existent, it seems plain that the Section 11e is to be applied according to its terms and under it the limitation period of five years fixed by the state statute is applicable.

Conclusion

The plain meaning of section 11e of the Bankruptcy Act, confirmed by the legislative history and other antecedents, requires the conclusion that the alternative clause of section 11e permitting suit by the trustee in behalf of the estate "within such further period of time as the Federal or State law may permit" embraces all such proceedings by the trustee and is not limited to causes of action other than those arising under the Bankruptcy Act. The applicability of the five-year period fixed by the state Statute of limitations cannot reasonably be questioned. The decision of the circuit court of appeals is based upon plainly erroneous propositions of law and is admittedly without supporting precedents. For these reasons it is respectfully submitted that the judgment of the circuit court of appeals should be reversed.

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No. 322

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., AN ILLINOIS CORPORATION, BANKRUPT,

Petitioner,

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF

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REPLY BRIEF

Analyzed, respondent's argument merely discloses the basic weakness of its position. The contentions advanced are not merely ill-founded in reason; they are inconsistent and would nullify an important portion of section 11e of the Bankruptcy Act.

I

Section 11e applies but does not bar suits to set aside preference two years after adjudication.

Respondent's first argument is that under section 11 of the 1898 Act before passage of the Chandler Act, it had been unanimously held—

> that the limitation provisions of section 11 of the Act of 1898 were the sole measure of the time within which actions were required to be brought by the trustee to set aside alleged preferences, and no period of limitation contained either in any state law or in any other federal statute could properly be applied to such a proceeding (Resp. Br. on Merits, p. 11).

Cited in support are *Meikle* v. *Drain*, 69 F. 2d 290 (C. C. A. 9); *Arnold Grocery Co.* v. *Shackelford*, 140 Ga. 585, 79 S. E. 470; see *Davis* v. *Willey*, 273 Fed. 397; *Harrigan* v. *Bergdoll*, 270 U. S. 560.[1]

These decisions were under section 11d of the 1898 Act:

> Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

Congress, by section 11e of the Chandler Act, radically changed the law to read:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim * * *.

---

[1] *Harrigan* v. *Bergdoll*, 270 U. S. 560, is obviously not in point. There it was assumed that the state statute applied. As pointed out in *Isaacs* v. *Neece*, 75 F. 2d 566, 568, the question whether state or federal statute of limitations applied was not raised or considered.

Despite this radical and material change in the provision, respondent states as its conclusion under Point I that the cited cases establish two propositions (Resp. Br. on Merits, p. 18):

> The above cases demonstrate that Congress by section 11e of the Chandler Act
>
> [a] codified its concurrence that the limitation provision contained in the bankruptcy act exclusively governed suits by the trustee to set aside voidable preferences, and
>
> [b] provided a period of two years subsequent to the date of adjudication to govern them.

Neither of these propositions advances respondent's argument.

The first is irrelevant [2] because petitioner recognizes that the provisions of section 11e do govern all suits by the trustee, including those to set aside voidable preferences.

The second proposition goes to the question at issue. But there is manifestly no suport in reason for the assertion, "The above cases [i. e., cases decided under section 11d and before enactment of section 11e with its radical change in language] demonstrate that Congress by section 11e of the Chandler Act * * * provided a period of

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[2] Respondent's reasoning by which it reaches this result is plainly untenable. This is an obvious perversion of the rule that re-enactment of a statute after judicial construction thereof will ordinarily be deemed to indicate Congresssional ratification of, and concurrence in, such construction. That rule has no application where, as here, the Congress has repealed the pertinent portions of section 11d (see Section 4 of the Chandler Act, June 22, 1938, c. 575, 52 Stat. 840, 940) and has enacted a new section, 11e, in language entirely different. Where the phraseology of the two enactments is essentially dissimilar, the reason on which the rule is based disappears and the rule itself has no application. Change in language is persuasive that a change in sense was intended. *Creek County* v. *Seber*, 318 U. S. 705, 714; *Brewster* v. *Gage*, 280 U. S. 327, 337; *Crawford* v. *Burke*, 195 U. S. 176, 190; *Pirie* v. *Chicago Title and Trust Company*, 182 U. S. 438, 448.

two years subsequent to the date of adjudication to govern them." Decisions under section 11d antedating enactment of section 11e with its completely different language cannot in reason affect interpretation of the latter.[3] Respondent offers no rule or theory by which to rationalize this obvious *non sequitur*. There is none.

The provision in section 11e that the trustee may institute proceedings in behalf of the estate "within two years subsequent to the date of adjudication *or within such further period of time as the federal or state law may permit*" is a plain adoption by generic reference of the limitation provisions of the state statutes and incorporates as part of section 11e all that is fairly covered by the reference. *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, 85; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 391-392. The language of the state statute is given force by the federal law and is just as much a part of the limitation provisions contained in section 11e of the Bankruptcy Act as if physically enacted in terms by the Congress. Cf. *Kendall* v. *United States*, 12 Pet. 524, 625; *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, 84-85. The five-year limitation period provided by the Illinois law is thus made an integral part of the second alternative clause of section 11e of the Bankruptcy Act as amended by the Chandler Act. Therefore, even if full effect is given to respondent's proposition (Resp. Br. on Merits, p. 18)—

> that the limitation provision contained in the bankruptcy act exclusively governed suits by the trustee to set aside voidable preferences,

it merely supports petitioner's contention that the five-year period thus provided by section 11e applies.

---

[3] See fn. 2.

None of the argument under respondent's Point I can be extended to justify or in any way support nullification of the specific language added by Congress in the alternate clause of section 11e:

> or within such further period of time as the * * * state law may permit.

"Further" is obviously here used in the sense of "additional." Since by definition a statute of limitations fixes the maximum time within which suit must be brought, it is manifest that the limitation provision contained in section 11e allows to the trustee for the commencement of suits to avoid preferences the period of two years or the period permitted by the state law, whichever is longer.

II

No exception in the Illinois Statute of Limitations prevents applicability of the five-year period fixed by Section 15 and by reference incorporated as part of Section 11e of the Bankruptcy Act.

Respondent's heading under Point II of its brief does not reflect the argument there made.

Respondent does not contend that section 15 of the Illinois statute of limitations is *per se*, and by virtue of its language, inapplicable to suits by the trustee to avoid preferences. Respondent admits that section 15 of the Illinois law does apply "if a different limitation period is not prescribed by section 11e" (Resp. Br. on Merits, p. 30).[4]

[4] Unless barred by the law of the jurisdiction where they arose and hence barred by section 20 of the Illinois Limitations Act (Ill. Rev. Stats. (State Bar ed. 1943) c. 83, sec. 21), causes of action arising under the laws of other jurisdictions are governed by the five-year period prescribed by section 15 because "not otherwise provided for" in the Illinois limitation law. *Bem v. Stanley*, 93 Ill. 230, 232 (1879); *Amber v. Whipple*, 139 Ill. 311, 314 (1891); *Schemmel v. Cooksley*, 256 Ill. 412, 413 (1912).

Respondent's argument is based on *Handtoffski* v. *Chicago Traction Co.*, 274 Ill. 282, in which it was held that the exception in section 12 of the Illinois statute of limitations, "except when a different limitation is prescribed by statute," is to read as part of sections 13, 14, and 15 of the statute, and in which, as an example, it was stated *obiter* that the period of limitation fixed by the Employers' Liability Act would prevent application of the limitation prescribed by section 15. We find no fault with the court's holding.[5]

But relying solely on this case, respondent argues: (Br. on Merits, pp. 2, 23):

> The application of that holding by the Illinois Supreme Court to this proceeding is clear. Section 15 of the Illinois Act does not apply because the Chandler Act by section 11e itself *has prescribed a different limitation, namely*, two years subsequent to the date of adjudication.
>
> * * * * * * *

[5] Probably wrong is the *obiter* statement that the exception in section 12 of the Illinois limitation law causes the limitation fixed in the Federal Employers' Liability Act to supersede the state statute of limitation. The result would be the same even in the absence of the exception in section 12 since the limitation contained in the federal act controls because it is a condition of the right. *Central Vermont Ry.* v. *White*, 238 U. S. 507, 511; *Atlantic Coast Line R. R.* v. *Burnette*, 239 U. S. 199, 201; *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633, 637; *Engel* v. *Davenport*, 271 U. S. 33, 38.

Furthermore, the word "statute" as used in the exception in section 12 is properly to be interpreted as referring only to statutes of Illinois. It is elementary that when in statutes a general reference to "law" is made, it can only relate to the "law" of the government making the reference. *Houston* v. *Moore*, 5 Wheat. 1, 42. This is the rule applied by the Illinois courts. In interpreting the Illinois limitation law it has been held that in suits on causes of action arising under laws of other jurisdictions, statutes of such foreign jurisdictions prescribing a longer period of limitation are to be given no effect and the five-year period prescribed by section 15 controls; this despite the exception in section 12. *Bemis* v. *Stanley*, 93 Ill. 230, 232 (1879); *Schemmel* v. *Cooksley*, 256 Ill. 412, 413 (1912); *Horan* v. *New Home Sewing Mach. Co.*, 289 Ill. App. 340.

> The same principle excludes from application to the instant suit the five year limitation provided by section 15 of the Illinois Limitations Act because section 11e of the Chandler Act itself prescribes the limitation period applicable thereto, namely, two years after the date of adjudication in bankruptcy.

Respondent thus ignores the express reference to state law and assumes as a premise that section 11e prescribes a two-year period of limitation for proceedings under section 60b of the Bankruptcy Act. In so doing, the respondent, of course, postulates the very point to be proved. This is the same fallacious reasoning by respondent which is referred to in petitioner's main brief (p. 11).

The same sort of circular reasoning is well-exemplified at a later point in the respondent's brief on the merits. There, however, it does not make the arbitrary choice of the two-year period on the re-reference to section 11e. Instead, it sets up an unbroken circle (Resp. Br. on Merits, p. 30):

> If we first consider section 11e we find it fixes a period of 2 years from the adjudication, except where a state law fixes a longer period. *The question then arises, does section 15 of the Illinois statute apply and fix a five year period? The proper answer is it does, if a different limitation period is not prescribed by section 11e. If we then inquire whether section 11e does fix a different limitation period we find that it does, and that it fixes a 2 year period, unless section 15 applies and fixes a five year period.* (Italics supplied)

The italicized portion constitutes the perfect circle in which respondent becomes involved by ignoring the fact that incorporation of the state law by reference causes section 11e to prescribe a period of limitation exactly the *same* as that prescribed by section 15 of the state law.

Other considerations make plain the fallacy in respondent's argument.

a. Respondent overlooks the fact that section 15, including the exception which is read into it, is incorporated in and made a part of section 11e by virtue of the reference therein to the state law. The result, then, is the same as though section 11e incorporated the two-year provision, the five-year provision of the state law, and the exception in the state law so as to authorize suit "within two years subsequent to the date of adjudication" "or within five years next after the cause of action accrued" "except when a different limitation is prescribed by statute." This makes apparent the absurdity of arguing that the exception in the last-quoted clause refers to the first clause so as to bar operation of the second clause.

b. If valid, respondent's argument under Point II amounts to saying that the state by the form of its legislation can prevent the Congress from adopting a state-prescribed period of limitation even in the field of bankruptcy where the federal power is paramount. Thus, under respondent's contention, even if section 15 of the Illinois statute in terms specifically included "suits under section 60b of the Bankruptcy Act," nevertheless the result would be the same as that for which respondent argues here: The trustee would be barred from suit two years after adjudication because of the exception in section 12 of the Illinois law and respondent's arbitrary selection of the two-year provision in section 11e to make the latter fall within the exception.

c. Respondent's argument is inconsistent within itself and, at least so far as suits in the Illinois courts, federal or state, are concerned, would entirely nullify the clause of section 11e referring to state laws.

Respondent has taken the position that if the trustee sues on a cause of action arising under state law, then the

reference in section 11e to state law does operate and the state law of limitations does apply (Br. in Opp., pp., 7-8; Br. on Merits, p. 18). But this interpretation cannot be reconciled with respondent's contention under Point II that the two-year clause of section 11e is a "different limitation" prescribed by statute within the meaning of the exception read into section 15 from section 12 of the Illinois act. If, as respondent contends, in the case of actions arising under the Bankruptcy Act the reference in section 11e to state law is to be ignored and the two-year provision is to be regarded as within the exception in section 15, thus preventing application of section 15, then the same result must obtain with respect to suits by the trustee on causes of action not arising under the Bankruptcy Act. No basis for differentiation has been suggested. Thus, the reference in section 11e to "such further period of time as the * * * state law may permit" would be completely nullified. But so to do would contravene the rule that a statute is to be interpreted, if possible, so as to give force and effect to all its parts. *D. Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *McDonald* v. *Thompson*, 305 U. S. 263, 266.

Respondent's Point II lends no weight to its argument because it assumes as a premise the very point to be established.

III

Respondent's Point III, if valid, makes the five-year limitation of the State Statute applicable and requires reversal of the decision below.

Respondent caps its tenuous argument as to construction with the contention (Resp. Br. on Merits, p. 24):

> The words "Federal or State law" as used in the next to the last line in the above quotation from section 11e clearly refer to claims against which the period of limitation fixed by such Federal or State law *could*

> have expired prior to the filing of the petition in bankruptcy. (Italics supplied).

Respondent repeats this argument (Resp. Br. on Merits, p. 27):

> The entire adjective clause—"against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy"—immediately following the words "any claim" obviously qualifies that term and *makes manifest the fact that Congress had in mind "claims" arising prior to the institution of the bankruptcy proceeding*, since it could only be with respect to claims of such a character that the period of limitation fixed by Federal or State law had expired partially at the time of the filing of the petition in bankruptcy. (Italics supplied).

The argument thus resolves into a contention that the prepositional phrase "upon any claim" refers only to claims against which the period of limitation could have expired prior to the filing of the petition. But if this be so, then no part of section 11e relates to suits by a trustee "upon any claim" arising out of the bankruptcy. For it is obvious that the phrase "upon any claim" modifies and limits the predicate of the whole sentence and, if it is limited as respondent contends, then the scope of the whole sentence in question is narrowed to include only proceedings by the trustee upon claims against which the period of limitation fixed by state law *could* have expired prior to the date of the petition in bankruptcy.

Because the right to avoid preferences is not a claim arising prior to the filing of the petition in bankruptcy and is not a claim against which the period of limitation fixed by federal or state law *could* have expired at the time of the filing of the petition, the consequence of respondent's argument, if it be accepted, is to interpret section 11e as

having utterly no bearing upon suits to set aside preferences. No other period of limitation established by the bankruptcy law or the Federal law is suggested as applicable. It would necessarily follow that under the Rules of Decision statute, the limitations provided in section 15 of the Illinois law would apply. *Campbell* v. *Haverhill*, 155 U. S. 610, 614-616, and other cases cited in petitioner's main brief (p. 26). Respondent's Point III, therefore, if sustained,[6] would require reversal of the decision he seeks to support.

Conclusion

Aside from the obviously fallacious reasoning of the court below and of the respondent here, certain other considerations which make against the result reached by the Seventh Circuit should not be overlooked.

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[6] The conclusion stated in the first sentence on page 25 is obviously fallacious. It is axiomatic that the only claim against which the period of limitation fixed by state law could have expired at the time of the filing of the petition in bankruptcy is a claim which pre-existed the filing of the petition. But from this it does not follow, as respondent asserts, that such claims are the only claims to which the period of limitation fixed by state law could have application. And certainly neither proposition supports the conclusion (stated by the respondent as a premise, p. 25): "Since the meaning of the phrase 'federal or state law' * * * is limited to the law applicable to causes of action which could pre-exist the date of the filing of the petition in bankruptcy * * *." While this at first blush may appear to be a restatement of the prior proposition, examination shows that it is a complete *non sequitur*.

Finally, even if "federal or state law" be limited in meaning, as respondent contends, to state law applicable to causes of action which could pre-exist the date of the filing of the petition, respondent's argument is not advanced. For obviously part of the state law applicable to causes of action which could pre-exist the date of the filing of the petition would be section 15. It results that the narrowing of the meaning of the phrase "federal or state law" for which respondent contends could in no way affect the result here. This shows that respondent seeks not to limit the meaning of this phrase but rather to narrow the meaning of the words "any claim" and so narrow the scope of the statute. Indeed, this true aspect of respondent's argument under Point III is confirmed in the argument on page 27 of its brief.

If respondent's position is correct, then it might well be argued as a corollary thereto that causes of action arising in favor of the trustee during the process of bankruptcy administration would become barred upon the expiration of two years from the date of adjudication since they did not pre-exist the filing of the petition. In some cases this might allow only a relatively few months or even weeks within which to bring suit.

The contention of respondent would also seem to carry with it the implication that in suits to avoid preferences the trustee would be deprived of the benefit of section 22 of the Illinois statute of limitations (Ill. Rev. Stats. (State Bar ed. 1943) c. 83, sec. 23):

> If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the suit discovers that he has such cause of action, and not afterwards.

The law of most other states, decisional or statutory, includes similar provisions. Respondent's interpretation would thus deprive the trustee and other creditors of the benefit of such provisions in suits under section 11e and under section 67d while at the same time continuing their protection against concealment in proceedings under section 70e with respect to causes of action under state law. (Cf. *First Presbyterian Church* v. *Rabbitt*, 118 F. 2d 732, 735.) Such a result is clearly to be avoided if possible. It would indeed be anomalous for Congress to bar suits on causes of action created by the Act and by Congress deemed essential to its operation while at the same time permitting to the trustee a longer period of limitation on causes of action arising under state law.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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January, 1945.

APPENDIX.

Section 11e of the Bankruptcy Act as added by the Chandler Act, June 22, 1938, c. 575, sec. 1, 52 Stat. 840, 849 (11 U. S. C. sec. 29e) provides:

> "e. A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement, or in the proceeding or by applicable Federal or State law, as the case may be."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 322

ROSCOE HERGET, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt,

Petitioner,

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, a National Banking Corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 20) is reported at 141 F. (2d) 150.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 5, 1944 (R. 23), and a petition for rehearing was denied April 5, 1944 (R. 31). The petition for a

writ of certiorari was filed August 5, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See Rule 38 (2) of this Court regarding the time for filing petition.

The petition for writ of certiorari was filed out of time because it was filed more than three months after the date of the denial by the Circuit Court of Appeals of the petition for rehearing.

Sec. 350 Title 28 U. S. C. A.

Kennedy Realty Corp. v. *City of New York*, 319 U. S. 750, 87 L. Ed. 1705.

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Medhurst v. *The South American*, 264 U. S. 587, 68 L. Ed. 863.

New York Central Railroad Co. v. *Middleport Gas & Electric Light Co.*, 260 U. S. 724, 67 L. Ed. 483.

The order of June 10, 1944 (R. 34) for the extension of time for filing petition for writ of certiorari is invalid because it does not affirmatively show that such extension was "for good cause shown" (Sec. 350 U. S. C. A. Title 28).

The power granted by said Section 350 to extend the jurisdictional period for filing a petition for writ of certiorari in this Court is exercisable by a Justice thereof only upon compliance with the condition imposed by said Section, namely, "for good cause shown."

The nature and limits of the judicial power of the United States are such as to require this Court of its own motion, to deny its own jurisdiction, in cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.

Mansfield etc. v. *Swan*, 111 U. S. 379, at 382.

The requirement that the record affirmatively show that this Court has jurisdiction of a petition for writ of certiorari filed after the expiration of the three months period prescribed by statute for the filing thereof, precludes indulging in any inference that "good cause" was shown for the extension of time to file such petition.

Since the record in this case fails affirmatively to show by recital or finding in the order of extension, or otherwise, that such order entered on the *ex parte* application of counsel for petitioner was "for good cause shown," it would seem necessarily to follow that such order is invalid.

For forms of motion to extend and the order extending time for filing petition for writ of certiorari, *affirmatively* showing "good cause" for such extension, see pp. 14 and 15 "Appellate Practice and Procedure in Supreme Court of United States" by Reynolds Robertson.

Questions Presented.

(1) Whether an action to recover a voidable preference under Section 60b of the bankruptcy act is barred by the limitation prescribed by section 11e of the same act after two years from the date of adjudication.

(2) Whether any further time is allowed by section 11e for the institution of any suit on a cause of action created by the bankruptcy act since said section allows such fur-

ther time only where applicable federal or state laws so permit.

(3) Whether the further time referred to in said section 11e applies only to causes of action arising under federal non-bankruptcy laws or under state laws and not to causes of action created by the bankruptcy act itself.

Statement.

Petitioner, a trustee in bankruptcy brought this suit in the District Court to recover from respondent certain alleged voidable preferences. Petitioner's complaint was dismissed on respondent's motion on the ground that the suit was brought more than two years after the date of adjudication in bankruptcy (i. e. 38 days short of five years from that date), and that under section 11e of the Chandler Act, the action was barred. The Circuit Court of Appeals affirmed the judgment of the District Court.

Statutes Involved.

Subsection 11e of the Bankruptcy Act, added by the Chandler Act, June 22, 1938, c. 575, sec. 1, 52 Stat. 840, 849 (11 U.S.C. sec. 29e) provides:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. • • •

The Illinois Statute of Limitations (Ill. Rev. Stats. (State Bar ed. 1943) c. 83) provides:

Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, *except when a different limitation is prescribed by statute.*

Sec. 13. Actions for slander or libel shall be commenced within one year next after the cause of action accrued.

Sec. 14. Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction or for seduction, or for criminal conversation, shall be commenced within two years after the cause of action accrued.

Sec. 15. Actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and *all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.* (Emphasis supplied)

Summary of Argument.

1. Section 11e of the Chandler Act bars the instant action because it was not brought within two years from the date of the adjudication in bankruptcy on April 11, 1938.

2. Section 11e bars suits to set aside and recover alleged voidable preferences unless the same are brought within two years from the date of adjudication. In so doing section 11e codifies the unanimous holdings of the courts construing section 11d of the Bankruptcy Act of 1898 to the effect that the limitation provision set forth in that act, to the exclusion of any other statute of limitations whatsoever, state or federal, applied to such suits.

3. The decisions under the 1898 Act were in substantial conflict with respect to the question whether state and non-bankruptcy statutes of limitation applied to causes of action inherited by the trustee from the bankrupt or his creditors, in contrast to causes of action to set aside and recover preferences which were created and vested in the trustee by the Bankruptcy Act itself.

4. Some of the decisions held that section 11d of the Act of 1898 controlled with respect to such inherited causes of action and other decisions held that state and federal non-bankruptcy statutes of limitation controlled with respect to those causes of action. Nevertheless, the opinions of the courts on both sides of that question repeatedly pointed out that a cause of action to set aside a voidable preference was governed exclusively by the limitation provision of the Bankruptcy Act itself.

5. All of the authorities held that suits brought by the trustee to set aside and recover voidable preferences are created by the Bankruptcy Act and are governed solely by the limitation provision contained in that Act and not by any state statute of limitations.

6. By providing in section 11e of the Chandler Act that the trustee should have two years from the date of adjudication in which to bring suits, Congress clearly indicated its intention to cut down the time for the commencement of such suits and to retain, as to such suits, a special and *exclusive* limitation statute.

7. Suits to set aside alleged voidable preferences are barred by section 11e unless brought within two years from the date of adjudication since there is no state or other federal limitation law applicable thereto.

ARGUMENT.

1. It is conceded by both petitioner and respondent that the proper limitation period applicable to the suit brought by petitioner in the District Court to recover alleged voidable preferences is determinable solely from section 11e of the Bankruptcy Act.

Respondent contended in the District Court and in the Circuit Court of Appeals that the trustee's suit to recover such preferences was barred after two years from the date of the adjudication. This contention was sustained by both such courts, based on the fact that the cause of action sued on was created by the Bankruptcy Act and did not arise under any federal *non*-bankruptcy or state law (Rec. 10). Petitioner's contention here is, as it was in those courts, that the catch-all provision of section 15 of the Limitations Act of Illinois permitted the bringing of such action within five years from the accrual of the cause of action. Such contention is asserted notwithstanding that by the express terms of section 12 of the Illinois Act such catch-all provision does not apply when a different limitation is prescribed by statute (*supra* p. 5). Petitioner's theory is that section 11e has adopted said section 15 of the Illinois Act by reference. (Specification No. 2, page 5). Our position is that section 11e has not adopted said section 15 of the Illinois Act by reference, as to causes of action created by the Bankruptcy Act. We contend that section 11e prescribes a two year period of limitation from the date of adjudication, and only if the cause of action sued on arises under a federal non-bankruptcy law (such as the Federal Securities Act) or under state law, then and only then, suit

may be brought within such further time as is permitted by the applicable federal or state law.

If our position, as thus stated, is correct then the Illinois Limitations Act is not involved at all since the cause of action, set forth in the complaint of petitioner, does not arise under any non-bankruptcy federal or state law but under the Bankruptcy Act which creates it. Hence no state law could possibly permit any further time than the two years from the date of adjudication, allowed by section 11e of the Bankruptcy Act, because such state law is not *applicable* to such cause of action.

Irrespective, however, of whether or not such adoption has occurred, as petitioner contends, there remains only the question of what is the Illinois law.

One of the judges of the court, whose decision is sought to be reviewed here, had long experience in the jurisprudence of the state of Illinois. This Court will ordinarily accept, and therefore will not review, save in exceptional cases, the considered determination of such question of state law by the Circuit Court of Appeals.

> *Huddlestone* v. *Dwyer*, 88 L. Ed. 933, at p. 936.
> *Helvering* v. *Stuart*, 317 U. S. 154 at p. 163; 87 L. Ed. 154 at p. 160.

This is not an exceptional case inviting a review by this Court, since the state statute of limitations clearly shows upon its face that the catch-all clause relied on by petitioner has no application when a different limitation period is prescribed by statute, such as is the case here.

Another reason why this is not an exceptional case is because the Supreme Court of Illinois has held in *Handtoffski* v. *Chicago Union Traction Co.*, 274 Ill. 282 at p. 286, that the catch-all limitation in section 15 of the Illinois Limitations Act does not apply when a different limitation is

prescribed by a federal statute. There is no Illinois case holding to the contrary, and none is cited by petitioner.

2. The decision of the court below follows the plain language of the statute involved. The exact language of section 11e of the Chandler Act is:

> "A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. * * *" (Sec. 29 (d) Title 11 U. S. C. A.)

The above section codifies the unanimous holdings of the courts construing section 11d of the Bankruptcy Act of 1898 to the effect that the limitation provision set forth in that Act, to the exclusion of any other statute of limitations whatsoever, state or federal, applied thereto. Since this case involves a suit by a trustee in bankruptcy to set aside alleged voidable preferences, the fundamental question is the proper construction of section 11e, as applied to a suit to enforce such a cause of action by the trustee. The petition for certiorari (p. 18) sets forth the sole comment in the Committee Report to the House of Representatives with respect to the Chandler Act which was made with reference to section 11e and which consists in substance merely of a restatement of the provision itself.

It is observed from this fact that the Committee was not of the opinion that it was proposing a radically new piece of legislation which required extensive discussion because of the change to be made in the existing law. As an examination of the decisions of the courts construing the limitation provision contained in section 11d of the Bankruptcy Act of 1898 will disclose, a proper construction of

section 11e of the Chandler Act demonstrates that it made no substantial change in the existing law, with respect to the *exclusiveness* of the limitation provision therein. It merely set at rest certain conflicts in the decisions interpreting section 11d.

Section 11d of the Act of 1898 provided as follows:

> "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed." (Sec. 29(d), USCA.)

The decisions hereinafter referred to applying and construing this provision disclose, that the courts were unanimous in holding that the limitation provisions of section 11d of the Act of 1898 were the sole measure of the time within which actions were required to be brought by the trustee to set aside alleged preferences, and no period of limitation contained either in any state law or in any other federal statute could properly be applied to such a proceeding. To interpret section 11e of the Chandler Act to impose a period of limitation of two years from the date of adjudication on the bringing of such an action by the trustee, without regard to the provisions of any state or other federal law relating to the time within which actions may be brought, codifies this unanimous result reached by the decisions construing section 11d of the Act of 1898. It is our contention that such is the only proper interpretation of section 11e of the Chandler Act, and that such interpretation sustains the judgments below and defeats the instant action, which was not brought until almost five years after the date of adjudication herein.

The decisions under the 1898 Act were in substantial conflict with respect to the question whether state and non-bankruptcy federal statutes of limitation apply to causes of action, inherited by the trustee from the bankrupt or his creditors, in contrast to causes of action to set aside and recover preferences which were created and vested in the trus-

tee by the Bankruptcy Act itself. Some of the decisions held that section 11d of the Act of 1898 controlled with respect to such inherited causes of action and other decisions held that state and federal non-bankruptcy statutes of limitation controlled with respect to those causes of action. Nevertheless, the opinions of the courts on *both* sides of that question repeatedly pointed out that a cause of action to set aside a voidable preference was governed exclusively by the limitation provision of the Bankruptcy Act itself.

A typical case, in which the cause of action was inherited by the trustee from creditors, and which was held governed by the state statute of limitations, is *Davis* v. *Willey*, 273 Fed. 397. That was an action by a trustee in bankruptcy under section 70e of the Bankruptcy Act to recover sums transferred to the defendant by the bankrupt and alleged to have been transferred in fraud of creditors. The trial court held as a conclusion of law that the action was barred by the California statute of limitations, which provided a period of three years. The Circuit Court of Appeals for the Ninth Circuit, affirming the decree of the trial court for the defendant, held that the state statute of limitations controlled and that the limitation period in the Bankruptcy Act for the institution of suits by a trustee in bankruptcy did not control.

Harrigan v. *Bergdoll*, 270 U. S. 560, 70 L. Ed. 733, was a trustee's action, as successor to the bankrupt, against a stockholder of the bankrupt corporation on account of unpaid stock subscriptions. This Court in that case held that the state statute of limitations applied and that the Bankruptcy law did not modify the right of action against the stockholder or create a new one.

Another line of cases supported the proposition that suits brought by trustees in bankruptcy on causes of action inherited by them, both from the bankrupt and from

creditors of the bankrupt, were governed by the limitation provision contained in section 11d of the Bankruptcy Act, and *not by state statutes of limitation.* Typical of this line of cases is *Isaacs* v. *Neece*, 75 Fed. (2d) 566. That was a suit brought by a trustee in bankruptcy under section 70e of the Bankruptcy Act against preferred stockholders of the bankrupt to cancel and set aside as fraudulent, and to recover back, payments the bankrupt had made to them in redemption of their stock. The theory of the suit was that the trustee was suing *as successor* to the rights of creditors of the bankrupt. The defendant relied upon the *state* statute of limitations as a bar to the suit. The Circuit Court of Appeals, held that the state statute of limitations did *not* apply, but *that the limitation period contained in section 11d of the bankruptcy act did,* and superseded all state statutes of limitation in suits brought by trustees in bankruptcy to recover on any cause of action.

Some subsequent cases followed those first referred to above, which held that actions not based upon and created by the Bankruptcy Act were governed by state statutes of limitation, and not by section 11d of the Bankruptcy Act of 1898. See *Silverman* v. *Christian*, 123 N. J. Eq. 506; 198 Atl. 832 and annotation in 82 A.L.R. 816. The *Silverman* case cited with approval both *Davis* v. *Willey, supra,* and *Harrigan* v. *Bergdoll, supra,* and criticized *Isaacs* v. *Neece, supra.* Other subsequent cases such as *Engebretson* v. *West, et al.*, 133 Nebr. 846; 277 N.W. 433, on the other hand, made the same holding as the Circuit Court of Appeals of the Fifth Circuit did in *Isaacs* v. *Neece.* This confllict, in cases not involving suits to recover voidable preferences, as to state versus the bankruptcy act limitation provision continued to rage until the passage of the Chandler Act.

No conflict existed prior to the passage of the Chandler Act in the cases involving causes of action created by

Section 60b for the recovery of voidable preferences. The cases uniformly held that state statutes of limitation did not apply to such causes of action, but that they were governed by old section 11d.

The Circuit Court of Appeals for the Ninth Circuit, which is the same court that had decided the case of *Davis* v. *Willey*, 273 Fed. 397, held in the case of *Meikle* v. *Drain*, 69 Fed. (2d) 290, that the limitation provision contained in section 11d of the Bankruptcy Act, and *not the state statute of limitations*, applied to a trustee's suit to set aside a voidable preference based on section 60b of the bankruptcy act.

Another case, applying the rule announced in the case of *Meikle* v. *Drain*, 69 Fed. (2nd) 290, to a suit brought by the trustee to recover voidable preferences under section 60b of the bankruptcy act, is *Arnold Grocery Co.* v. *Shackelford*, 140 Ga. 585, 79 S.E. 470. In that case the court held that the limitation provision contained in section 11d of the bankruptcy act governed actions brought by the trustee for the recovery of voidable preferences under section 60b of the bankruptcy act of 1898.

With this background of decisional law Congress enacted section 11e of the Chandler Act.

The above cases demonstrate that Congress by section 11e of the Chandler Act codified its concurrence that the limitation provision contained in the Bankruptcy Act exclusively governed suits by the trustee to set aside voidable preferences, and provided a period of two years subsequent to the date of adjudication to govern them.

Congress has also by section 11e preserved part of the rule expressed in *Davis* v. *Willey*, 273 Fed. 397, and *Harrigan* v. *Bergdoll*, 270 U. S. 560, namely, that causes of action inherited by the trustee in bankruptcy from the debtor and from his creditors are to be governed by the

limitation period prescribed by the applicable state or federal law, other than the Bankruptcy Act, but fixed a two year limitation period, in any event, for bringing suit to enforce a cause of action not outlawed when the petition in bankruptcy was filed.

The reasons assigned by the foregoing cases for their holding that old section 11d exclusively applied to causes of action created by the Bankruptcy Act apply with equal force to section 11e of the Chandler Act.

By providing in section 11e of the Chandler Act that the trustee should have two years from the date of adjudication within which to bring suits, Congress clearly indicated its intention to cut down the time for the commencement of such suits and to retain as to such suits a special and *exclusive* limitation statute. When so providing in section 11e, Congress undoubtedly had before it section 8 of the bankruptcy act of 1841 as well as section 2 of the bankruptcy act of 1867, both of which prescribed a two year limitation period.

(Vol. 9, Collier on Bankruptcy, 14th Ed., pp. 1743-1747.)

The reason for fixing such a short period of limitation in the acts of 1841 and 1867, was pointed out in the case of *Bailey* v. *Glover*, 21 Wall. 342, where the court said (88 U. S. 342 at 346):

> "It is obviously one of the purposes of the Bankrupt Law, that there should be a speedy disposition of the bankrupt's assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay. Appeals in some instances must be taken within ten days. * * To prevent this as

much as possible (the estate being wasted in litigation and delay) 'Congress has said to the assignee, You shall commence no suit two years after the cause of action has accrued to you, nor shall you be harassed by suits when the cause of action has accrued more than two years against you. Within that time the estate ought to be nearly settled up and your functions discharged, and we close the door to all litigation not commenced before it has elapsed.' "

The foregoing limitation period in the Act of 1867 for the bringing of a suit by assignees in bankruptcy was also discussed at length by this Court in *Jenkins* v. *International Bank*, 106 U. S. 571.

Section 11e has adopted the two year limitation period contained in the 1841 and 1867 Acts so far as suits to set aside voidable preferences are concerned.

Paraphrasing the foregoing language of the case of *Bailey* v. *Glover*, Congress has said to the trustee by section 11e of the Chandler Act that "in the case of causes of action created by the Bankruptcy Act you shall begin no suit after two years subsequent to the adjudication. Within that time the estate ought to be nearly settled up and your functions discharged and we close the door to all suits on causes of action created by the Bankruptcy Act and not commenced before the expiration of that period."

3. The legislative history of section 11e referred to in the petition for writ of certiorari is summed up on page 19 of the petition in a quotation from 1 Collier on Bankruptcy (14th ed.) sec. 11.13, pp. 1186-1188. Such quotation establishes our contentions (1) that section 11e operates as a statute of limitations on suits brought by a trustee in bankruptcy, and (2) in the event that the *applicable* state statute is longer in duration than the two year period specified in section 11e, that section provides suit may be

brought within such further period of time as the state law may permit. Since under all the authorities no state statute of limitations is applicable to a cause of action created by the Bankruptcy Act, which contains a special statute of limitations there is no applicable state statute which permits further time to bring suit.

Petitioner omits all reference to the following which appears on page 1189 of the same volume of Collier. The omitted portion is as follows:

> * * * "Sec. 11e provides that the period for bringing suit is two years from the *date of adjudication* in bankruptcy unless the federal or state law permits suit at a later period. The date of closing the estate no longer has any significance in this regard; hence a suit by the receiver or trustee ordinarily could not be instituted after two years have elapsed from the date of adjudication, irrespective of the later reopening of the estate. Only where an *applicable* state or federal statute of limitations is of longer duration than the two years specified could such a suit be maintained, and then only within the time remaining under the state or federal law." (Second emphasis supplied)

The foregoing quotation makes clear that section 11e prescribes a two year period from the date of adjudication for the bringing of a suit by a trustee and allows further time only in the event that the cause of action sued on arises under federal non-bankruptcy or state law. We submit that, giving full consideration to the legislative history of section 11e, its plain meaning is that in a case where the cause of action arises under federal non-bankruptcy law if there is a federal statute of limitations it applies, and if the cause of action arises under state law the state statute of limitation applies, but that where the cause of action is

created by the Bankruptcy Act the limitation period of two years prescribed is the only applicable period of limitation.

It is respectfully submitted that the petition should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 322

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., AN ILLINOIS CORPORATION, BANKRUPT, *Petitioner,*

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief for the Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 322

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., AN ILLINOIS CORPORATION, BANKRUPT, *Petitioner,*

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief for the Respondent.

Opinions Below.

The opinion of the United States District Court for the Southern District of Illinois (R. 9) is reported in 53 F. Supp. 265. The opinion of the circuit court of appeals (R. 20-23) is reported in 141 F. 2d 150.

Jurisdiction.

The judgment of the circuit court of appeals sought to be reviewed was entered February 5, 1944 (R. 23). Petition for rehearing seasonably filed by petitioner (R. 25) was denied on April 5, 1944 (R. 31). By order of Mr. Justice Murphy entered June 10, 1944, time within which to file petition for certiorari was extended to August 5, 1944 (R. 34). Petition for a writ of certiorari was filed August 5, 1944, and was granted October 9, 1944 (R. 35). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Counter-statement of Questions Presented.

1. Whether the District Court and Circuit Court of Appeals were not correct in holding that this proceeding to recover a preference under Section 60b of the Bankruptcy Act was barred by the limitation of two years from the date of adjudication prescribed by Section 11e thereof, because such two year limitation prescribed by Section 11e has exclusive application to actions by the Trustee based upon causes of action created by the Bankruptcy Act.

2. Whether the District Court and Circuit Court of Appeals were not correct in holding that Section 11e of the Bankruptcy Act barred the bringing of the instant suit by the Trustee at the end of two years from the date of adjudication under Section 11e for the reason that no different or longer period of limitation is prescribed for the bringing of such action by the Illinois statute of limitations.

Statutes Involved.

Subsection 11e of the Bankruptcy Act, added by the Chandler Act, June 22, 1938, c. 575, sec. 1, 52 Stat. 840, 849 (11 U. S. C. sec. 29e) provides:

A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. • • •[1]

The Illinois statute of limitations, Act of April 11, 1873, Laws 1873, p. 121 (Ill. Rev. Stats. (State Bar ed. 1943) c. 83, secs. 13-16) provides:

Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, *except when a different limitation is prescribed by statute.*

Sec. 13. Actions for slander or libel shall be commenced within one year next after the cause of action accrued.

Sec. 14. Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction or for seduction, or for criminal conversation, shall be commenced within two years after the cause of action accrued.

Sec. 15. Actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal prop-

---

[1] Prior to the passage of the Chandler Act, the relevant provision of the Bankruptcy Act was (11 U. S. C. Sec. 29(d)):

Sec. 11d. Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

The Chandler Act amended this subsection so as to narrow its application to suits *against* the trustee (11 U. S. C. Sec. 29(d)):

Sec. 11d. Suits shall not be brought against a person who has acted as a receiver or trustee of a bankrupt estate, upon any matter arising in connection with the administration thereof, subsequent to two years after the estate has been closed.

Suits *by* the trustee are covered by Section 11e added by the Chandler Act.

erty or damages for the detention or conversion thereof, and *all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.* (Emphasis supplied.)

Statement.

The statement set forth on pp. 4 and 5 of Petitioner's Brief is correct. However, the last paragraph thereof fails to make clear that the opinion of the Circuit Court of Appeals based its holding both upon the ground (1) that the two year limitation provided by Section 11e applies exclusively to this cause, since it is a suit to set aside a voidable preference, and (2) that, even if the two year limitation provided by Section 11e were not to be exclusively applied to causes of action created by the Bankruptcy Act, such as the one at bar, there is no period of limitation fixed by the Illinois statute of limitations applicable to such cause of action and for that reason petitioner's suit was barred by the two year provision of Section 11e.

SUMMARY OF ARGUMENT.

There is no Illinois statute of limitations applicable to a suit by a trustee in bankruptcy to set aside and recover voidable preferences.

A.

The "catch-all" clause in section 15 of the Illinois Statute of Limitations does not apply to suits to set aside and recover voidable preferences under section 60b of the Chandler Act because:

(1) Such suits are expressly excepted by section 12 of that Act from the provisions of section 15, thereof, since section 11e of the Chandler Act prescribes by statute a different limitation for such suits.

Handtoffski v. Chicago Traction Co., 274 Ill. 282, 113 N. E. 620,

and

(2) the limitation period of two years from the date of the adjudication provided in section 11e of the Chandler Act constitutes the sole limitation law applicable to such actions.

Meikle v. Drain, 69 Fed. (2d) 290.
Arnold Grocery Co. v. Schackelford, 140 Ga. 585; 79 S. E. 470.
Davis v. Willey, 273 Fed. 397.
Bailey v. *Glover*, 88 U. S. 342.
Isaacs v. *Neece*, 75 Fed. (2nd) 566.

B.

The limitation provision in the Bankruptcy Act (section 11e) constitutes the sole limitation law applicable to

suits brought under section 60b of that act to set aside and recover voidable preferences.

Meikle v. Drain, 69 Fed. (2d) 290.
Arnold Grocery Co. v. Shackelford, 140 Ga. 585, 79 S. E. 470.
Davis v. Willey, 273 Fed. 397.
Jenkins v. *International Bk.*, 106 U. S. 571.
Isaacs v. *Neece*, 75 Fed. (2nd) 566.

C.

Section 11e of the Chandler Act applies to bar the bringing of suits to recover voidable preferences under section 60b of that act unless such suits are brought within two years from the date of adjudication. In so doing that section codifies the unanimous holdings of the courts construing section 11d of the Bankruptcy Act of 1898 to the effect that the limitation provision therein set forth to the exclusion of any other statute of limitations whatsoever, state or federal, applied thereto.

Meikle v. Drain, 69 Fed. (2d) 290.
Arnold Grocery Co. v. Shackelford, 140 Ga. 585, 79 S. E. 470.
Davis v. Willey, 273 Fed. 397.
Bailey v. *Glover*, 88 U. S. 342.
Isaacs v. *Neece*, 75 Fed. (2nd) 566.

D.

Our contention that section 15 of the Illinois Statute of Limitations does not apply to this case is based upon—

(1) the provisions of section 11e of the Chandler Act,

(2) the uniform holdings under the Bankruptcy Acts of 1841, 1867 and 1898 that the limitation provisions contained in such Acts furnished the exclusive limitation law

applicable to suits brought to set aside and recover voidable preferences.

Bailey v. *Glover*, 88 U. S. 342.
Jenkins v. *International Bank*, 106 U. S. 571.
Meikle v. *Drain*, 69 Fed. (2d) 290.
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Isaacs v. *Neece*, 75 Fed. (2d) 566.

(3) the express language contained in Section 12 of the Illinois Statute of Limitations excepting from the purview of that Act, and more particularly from Section 15 thereof, actions as to which there was provided a different limitation prescribed by federal statute such as section 11e of the Chandler Act, and

(4) the decision of the Supreme Court of Illinois in *Handtoffski* v. *Chicago Traction Company*, 274 Ill. 282, 113 N. E. 620, holding that section 15 of the Illinois Statute of Limitations Act relied upon by petitioner, has no application to any suit when a different limitation is provided therefor by statute, state or federal.

E.

The cases differing in their holdings from the decisions of *Davis* v. *Willey*, 273 Fed. 397 and *Meikle* v. *Drain*, 69 Fed. (2d) 290, do not differ from the holding in those and other cases that only the limitation provision in the bankruptcy act (and not any non-bankruptcy federal or state statute of limitations) applies to suits under section 60b of the bankruptcy act to set aside and recover voidable preferences. The leading case in that group is *Isaacs* v. *Neece*, 75 Fed. (2d) 566. They criticized the holdings in *Davis* v. *Willey* and *Meikle* v. *Drain*, on the ground that the latter do not go far *enough* in that they fail to hold that the exclusive limitation period applicable to suits in

all types of actions brought by the trustee is the bankruptcy limitation contained in that act and not any non-bankruptcy federal or state statute of limitations.

F.

No case has been or can be cited by petitioners to support the contention that the Illinois five year statute of limitations applies to or controls this case.

G.

The phrase "Federal or State law," as used in two places in section 11e of the Chandler Act, in the absence of an indication to the contrary, must be assumed to have been employed by Congress in the same and not in different senses.

United States v. Cooper Corporation, 312 U. S. 600, at 607.

Moweaqua Coal Corp. v. Indust. Corp., 360 Ill. 194, 195 N. E. 607.

H.

Giving that phrase in both instances in which it is used in section 11e the same meaning, it is clear that the provision "for such further time as the federal or state law may permit" cannot apply to this suit because it is based upon a cause of action (to set aside an alleged voidable preference) created by the bankruptcy act. The second instance in which that phrase ("Federal or State Law") is used clearly shows that claims under non-bankruptcy federal law and state law are meant since that phrase is there used as applied to causes of action which could have pre-existed the filing of the petition in bankruptcy.

I.

The provision for further time for the institution of proceedings on behalf of the estate contained in section 11e applies only to claims which are not created by the bankruptcy act, and which were not outlawed at the time of the filing of the petition in bankruptcy. It does not apply to the instant suit to set aside an alleged voidable preference which is a cause of action created by that Act.

Davis v. Willey, 273 Fed. 397.

Arnold Grocery Co. v. Schackelford, 140 Ga. 585; 79 S. E. 470.

Isaacs v. Neece, 75 Fed. (2d) 566.

Bailey v. *Glover*, 88 U. S. 342.

Jenkins v. *International Bank*, 106 U. S. 571.

Meikle v. *Drain*, 69 Fed. (2d) 290.

ARGUMENT.

SECTION 11e OF THE CHANDLER ACT BARS THE INSTANT ACTION BECAUSE IT WAS NOT BROUGHT ON OR BEFORE APRIL 11, 1940, WHICH WAS TWO YEARS SUBSEQUENT TO THE DATE OF ADJUDICATION IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC.

I.

As far as suits brought by the trustee to set aside and recover alleged preferences are concerned, section 11e applies to bar the bringing of them unless the same are brought within two years from the date of adjudication. In so doing it codifies the unanimous holdings of the courts construing section 11d of the Bankruptcy Act of 1898 to the effect that the limitation provision set forth in the Bankruptcy Act, to the exclusion of any other statute of limitations whatsoever, state or federal, applied thereto.

Since this case involves a suit by a trustee in bankruptcy to set aside alleged voidable preferences, the fundamental question is the proper construction of section 11e, as applied to a suit to enforce such a cause of action by the trustee.

Petitioner's brief at pages 21-22 sets forth the sole comment in the Committee Report to the House of Representatives with respect to the Chandler Act which was made with reference to section 11e. It consists in substance merely of a restatement of the provision itself. It is observed from this fact that the Committee was not of the opinion that it was proposing a radically new piece

of legislation which required extensive discussion because of the change to be made in the existing law. As an examination of the decisions of the courts construing the limitation provision contained in section 11d of the Bankruptcy Act of 1898 will disclose, a proper construction of section 11e of the Chandler Act demonstrates that it made no substantial change in the existing law, and merely set at rest certain conflicts in the decisions interpreting section 11d.

Section 11d of the Act of 1898 provided as follows:

> "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed." (Sec. 29(d), USCA Tit. 11)

As the examination made hereinafter of the decisions applying and construing this provision discloses, the courts were unanimous in holding that the limitation provisions of section 11d of the Act of 1898 were the sole measure of the time within which actions were required to be brought by the trustee to set aside alleged preferences, and no period of limitation contained either in any state law or in any other federal statute could properly be applied to such a proceeding. To interpret section 11e of the Chandler Act to impose a period of limitation of two years from the date of adjudication on the bringing of such an action by the trustee, without regard to the provisions of any state or other federal law relating to the time within which actions may be brought, codifies this unanimous result reached by the decisions construing section 11d of the Act of 1898. It is our contention that such is the only proper interpretation of section 11e of the Chandler Act, and that such interpretation sustains the judgment below and defeats the instant action, which was not brought until almost five years after the date of adjudication herein.

The decisions under the 1898 Act were in substantial conflict with respect to the question whether state and

non-bankruptcy federal statutes of limitation apply to causes of action, inherited by the trustee from the bankrupt or his creditors, in contrast to causes of action to set aside and recover preferences which were created and vested in the trustee by the Bankruptcy Act itself. Some of the decisions held that section 11d of the Act of 1898 controlled with respect to such inherited causes of action and other decisions held that state and federal non-bankruptcy statutes of limitation controlled with respect to those causes of action. Nevertheless, the opinions of the courts on *both* sides of that question repeatedly pointed out that a cause of action to set aside a voidable preference was governed exclusively by the limitation provision of the Bankruptcy Act itself.

A typical case, in which the cause of action was inherited by the trustee from creditors, and which was held governed by the state statute of limitations, is *Davis v. Willey*, 273 Fed. 397. That was an action by a trustee in bankruptcy under section 70e of the Bankruptcy Act to recover sums transferred to the defendant by the bankrupt and alleged to have been transferred in fraud of creditors. The trial court held as a conclusion of law that the action was barred by the California statute of limitations, which provided a period of three years. The Circuit Court of Appeals for the Ninth Circuit, in affirming the decree of the trial court for the defendant, held that the state statute of limitations controlled and that the limitation period in the bankruptcy act for the institution of suits by a trustee in bankruptcy did not control. The court there said:

> "This brings us to the question of whether the action is subject to the provision of limitation of the Code of Civil Procedure of California, or to such period of limitation as may be found in the Bankruptcy Act. By the Bankruptcy Act the trustee is given title to money fraudulently transferred, and he has a right to sue to recover it.

'The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred,' etc. Section 70e.

Section 11d of the Bankruptcy act of 1898 (Comp. St. Sec. 9595), provides that—

'Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.'

The section last quoted seems to be confined to suits founded strictly upon the Bankruptcy Act. For instance, a case within section 60b of the act (Comp. St. Sec. 9644) may be governed by it. The distinction between actions founded upon the Bankruptcy Act and those founded upon rights existing under the common or state laws is clearly recognized in Arnold Co. v. Shackelford, 140 Ga. 585, a case cited by plaintiff in error. But under section 70e heretofore quoted, the trustee may void any transfer which any creditor might have avoided. This right is conferred upon the trustee to put him in a position to assert the right which the creditor might have possessed in suing to set aside a transfer. *The trustee is really subrogated. No new rights, no additional remedies, are created for the benefit of the creditor, other than such as the creditor would have had had it not been for the bankruptcy.* In *Holbrook* v. *International Trust Co.*, 220 Mass. 130, 107 N. E. 665, the court said:

'All that section 70e of the Bankruptcy Act does is to give authority to the trustee in bankruptcy to enforce the rights of creditors to avoid fraudulent transfers of property made by the bankrupt if such fraudulent transfers have been made. That is to say whether a particular transfer was or was not fraudulent as to creditors under Section 70e *does not depend upon the United States Bankruptcy Act*, but upon the laws of the state which govern the transfer of the property in question.'

To the same effect is the able opinion by Judge Lowell in *In re Mullen* (D. C.) 101 Fed. 413; *Manning* v. *Evans*, (D. C.) 156 Fed. 106.

> Having sued herein under section 70e, the suit is based on the state law, and therefore the controlling point is whether McGinn could have maintained the action, under the law of the state. To this there is but one plain answer. The action, if brought in the state court, would be barred, and therefore the state statute has been correctly applied in the federal court, and, as plaintiff in error, McGinn, failed to assert any rights he may have had within the prescribed time, his action must now be held to be barred.
>
> The judgment is affirmed." (Emphasis ours.)

Harrigan v. *Bergdoll*, 270 U. S. 560, 70 L. Ed. 733, was a trustee's action, as successor to the bankrupt, to recover against a stockholder of the bankrupt corporation on account of unpaid stock subscriptions. This Court in that case held that the state statute of limitations applied and in so doing the Court said:

> "*The Bankruptcy Law* * * * *does not modify this* right of action against a stockholder *or create a new one.* It merely provides the right *created by the state law* shall pass to the trustee and be enforced by him for the benefit of creditors." (Emphasis ours.)

It is clear from the above italicized language that this Court recognized that state statutes of limitations did not apply to actions created by the Bankruptcy Act.

Another line of cases supported the proposition that suits brought by trustees in bankruptcy on causes of action inherited by them, both from the bankrupt and from creditors of the bankrupt, were governed by the limitation provision contained in section 11d of the Bankruptcy Act, and *not by state statutes of limitation.* Typical of this line of cases is *Isaacs* v. *Neece*, 75 Fed. (2d) 566. That was a suit brought by a trustee in bankruptcy under section 70e of the Bankruptcy Act against preferred stockholders of the bankrupt to cancel and set aside as fraudulent, and to recover back, payments the bankrupt

had made to them in redemption of their stock. The theory of the suit was that the trustee was suing *as successor* to the rights of creditors of the bankrupt. The defendant relied upon the *state* statute of limitations as a bar to the suit. The Circuit Court of Appeals, in holding that the state statute of limitations did *not* apply, but *that the limitation period contained in section 11d of the bankruptcy act did*, said:

> "We think the trustee's position that section 29 fixes the time he may sue all causes of action not already barred when the bankruptcy proceedings were filed, furnishes a more reasonable, a more workable theory of limitation than the one advanced in the *Davis* and *Drain* Cases, *supra*, that it applies to some actions, but not to others. This position is not only in accord with the uniform rule of decision under the corresponding section of the prior act, but it is in the interest of the just and effective administration of bankruptcy estates. Cf. *Coppard* v. *Stanush* (Tex. Civ. App.) 258 S.W. 254."

Some subsequent cases followed those first referred to above, which held that actions not based upon and created by the bankruptcy act were governed by state statutes of limitation, and not by section 11d of the Bankruptcy Act of 1898. See *Silverman* v. *Christian*, 123 N. J. Eq. 506, 198 Atl. 832 and annotation in 82 A.L.R. 810. The *Silverman* case cited with approval both *Davis* v. *Willey*, *supra*, and *Harrigan* v. *Bergdoll*, *supra*, and criticized *Isaacs* v. *Neece*, *supra*. Other subsequent cases, such as *Engebretson* v. *West*, *et al.*, 133 Nebr. 846, 277 N.W. 433, on the other hand, made the same holding as the Circuit Court of Appeals of the Fifth Circuit did in *Isaacs* v. *Neece*. This conflict, in cases not involving suits to recover voidable preferences, as to state versus the bankruptcy act limitation provision continued to rage until the passage of the Chandler Act.

No conflict existed prior to the passage of the Chandler Act in the cases involving causes of action created by Section 60b for the recovery of voidable preferences. The cases uniformly held that state statutes of limitation did not apply to such causes of action, but that they were governed by old section 11d.

The Circuit Court of Appeals for the Ninth Circuit, which is the same court that had decided the case of *Davis* v. *Willey*, 273 Fed. 397, held in the case of *Meikle* v. *Drain*, 69 Fed. (2d) 290, that the limitation provision contained in section 11d of the bankruptcy act, and *not the state statute of limitations*, applied to a trustee's suit to set aside a voidable preference based on section 60b of the bankruptcy act. In so holding, the court said:

> "The appellant contends that subdivision (d) of section 11 of the Bankruptcy Act (11 USCA sec. 29(d)) is the applicable statute of limitations, and that therefore this suit by the trustee having been brought before the estate has been closed is brought within time. The statute referred to is as follows: '(d) Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.'
>
> In our decision in *Davis* v. *Willey*, 273 F. 397, 400, we held that, where the action was brought by the trustee under section 70e of the Bankruptcy Act, the state statute of limitations controlled as to the institution of an action to enforce the right under the state law.
>
> The appellant, however, contends that, where the right of action arises under the Bankruptcy Act as in the case of the right given the trustee by section 60b of the Bankruptcy Act, the period of limitation is that fixed by section 11d of the Bankruptcy Act. This was tentatively recognized by this court in *Davis* v. *Willey, supra*, where it said: 'The section last quoted seems to be confined to suits founded strictly upon the Bankruptcy Act. For instance, a case within

section 60b of the act (Comp. St. sec. 9644 (11 USCA sec. 96, subd. (b)) may be governed by it.'

We think it clear that, where the right of action is given by the Bankruptcy Act and is based thereon and not upon a state statute, the provisions of section 11d of the Bankruptcy Act control, and, consequently, that a suit brought by the trustee during the pendency of the bankruptcy proceedings is within time.

We conclude, therefore, that the first cause of action stated by the appellant is not barred by the state statute." (Emphasis supplied.)

Another case, applying the rule announced in the case of *Meikle* v. *Drain,* 69 Fed. (2nd) 290, to a suit brought by the trustee to recover voidable preferences under section 60b of the bankruptcy act, is *Arnold Grocery Co.* v. *Shackelford,* 140 Ga. 585, 79 S.E. 470. In that case the court held that the limitation provision contained in section 11d of the bankruptcy act governed actions brought by the trustee for the recovery of voidable preferences under section 60b of the bankruptcy act of 1898. The Supreme Court of Georgia in so holding, referred to section 11d and said:

"Section 60b of the bankrupt act was not designed in any event to give the bankrupt a cause of action against the transferee, and therefore a case under that statute would stand on a different footing from a suit on some right of the bankrupt which might, by operation of law under section 70a of the bankrupt act, have passed from the bankrupt to the trustee. *Section 11d was manifestly intended to apply, among others, to cases falling under section 60b of the act, to the exclusion of any other statute of limitations.* Under this view the action was not barred, and the judge committed no error in so holding." (Emphasis supplied.)

It appears from the foregoing that prior to the passage of the Chandler Act in 1938 a conflict existed in the court

decisions, as to the correct rule of limitations applicable to causes of action inherited by the trustee in bankruptcy from the bankrupt and from the creditors of the bankrupt. One line held that the state statute of limitations applied and the other that the limitation provision contained in section 11d of the bankruptcy act applied. All of the decisions, however, recognized that the limitation provision contained in section 11d was the exclusive limitation provision applicable to suits brought by trustees to recover voidable preferences under section 60b of the bankruptcy act. This is shown by the decisions of the courts in *Davis* v. *Willey*, *Harrigan* v. *Bergdoll*, *Isaacs* v. *Neece*, *Meikle* v. *Drain*, and *Arnold Grocery Co.* v. *Shackleford*.

With this background of decisional law Congress enacted section 11e of the Chandler Act.

The above cases demonstrate that Congress by section 11e of the Chandler Act codified its concurrence that the limitation provision contained in the bankruptcy act exclusively governed suits by the trustee to set aside voidable preferences, and provided a period of two years subsequent to the date of adjudication to govern them.

Congress has also by section 11e preserved part of the rule expressed in *Davis* v. *Willey*, 273 Fed. 397, and *Harrigan* v. *Bergdoll*, 270 U. S. 560, namely, that causes of action inherited by the trustee in bankruptcy from the debtor and from his creditors are to be governed by the limitation period prescribed by the applicable state or federal law, other than the bankruptcy act, but fixed a two year limitation period, in any event, for bringing suit to enforce a cause of action not outlawed when the petition in bankruptcy was filed.

The reasons assigned by the foregoing cases for their holding that old section 11d exclusively applied to causes

of action created by the bankruptcy act applies with equal force to section 11e of the Chandler Act.

By providing in section 11e of the Chandler Act that the trustee should have two years from the date of adjudication within which to bring suits, Congress clearly indicated its intention to cut down the time for the commencement of such suits *to the exclusion of all other statutes of limitations.*

II.

Section 11e bars suits to set aside alleged preferences unless brought within two years from the date of adjudication since there is no state or federal limitation law other than section 11e of the Chandler Act applicable thereto.

Petitioner contends that section 15 of the Illinois Limitations Act (Bar Ass'n Stats. 1943, Chap. 83, Sec. 15) is applicable to this suit, and prescribes a five year period of limitation which had not expired when this suit was brought 38 days less than five years subsequent to the date of adjudication in bankruptcy. According to petitioner, that section is applicable to this proceeding because this suit constitutes a "civil action not otherwise provided for" by the Illinois Limitations Act. Section 15 of the Illinois Limitations Act, to be properly understood, must be read in connection with Sections 12, 13 and 14. The four sections provide as follows:

> "Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, *except when a different limitation is prescribed by statute*:
>
> Sec. 13. Actions for slander or libel shall be commenced within one year next after the cause of action accrued.

Sec. 14. Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction, or for seduction, or for criminal conversation, shall be commenced within two years after the cause of action accrued.

Sec. 15. Actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." (Emphasis supplied.)

As interpreted by the Supreme Court of Illinois in *Handtoffski* v. *Chicago Traction Co.*, 274 Ill. 282, 113 N.E. 620 that portion of section 15 of the Illinois Limitations Act relied upon by plaintiff, providing a five year limitation for "all civil actions not otherwise provided for", has no application to the instant suit because of the admitted fact that section 11e of the Chandler Act itself governs this proceeding and in consequence this suit is a civil action which is "otherwise provided for". Petitioner concedes that the issue before this Court is not whether section 11e of the Chandler Act applies, but the proper construction to be given to section 11e in applying it to this suit.

Handtoffski v. *Chicago Traction Co.* involved an action for damages for personal injuries. The suit proceeded upon the theory that since the defendant was a common carrier and the plaintiff was a passenger, an implied contract existed on the part of defendant to carry the plaintiff safely. A suit was brought in assumpsit after the two years statutory period provided for bringing an action for injury to the person had expired. The plaintiff contended that section 15 of the Illinois Limitations Act applied and that the action was not barred by section 14. After setting

forth verbatim the above quoted sections 12-15 inclusive of the Illinois Limitations Act, the Illinois Supreme Court said:

"It will be observed that in sections 13, 14 and 15 the limitations are not based upon the form of the particular action named but on the particular injury sued for or upon the obligation out of which the action grows. The provisions of section 12 are to be considered and read as a part of sections 13, 14 and 15. Section 15, so far as it is material to this controversy, should be read as follows: Actions on unwritten contracts, express or implied, shall be commenced within five years next after the cause of action accrued, except when a different limitation is prescribed by statute. Said section 14 is also to be read that actions for damages for an injury to the person shall be commenced within two years next after the cause of action accrued, except when a different limitation is prescribed by statute. The natural construction of section 14 would seem to be that the limitation for all actions for damages for an injury to the person is fixed at two years next after the cause of action accrued, unless a different limitation is fixed by the statute for a particular character of personal injury, or a personal injury in a particular occupation, or under particular statutes giving damages for personal injuries to certain classes of individuals, *such as the Employers' Liability Act.* Said section 14 clearly fixes the limitation for personal injuries at two years, without any regard to the form of action. There is no indication anywhere in any one of said four sections that a different limitation is to be applied if any one of the particular actions mentioned may be brought in an action *ex delicto* or *ex contractu*, as the pleader may choose. Section 15 is broad enough in its language, *when considered alone*, to apply the limitation of five years to an action for personal injury when the action is brought on an implied contract, as in this case. When considered, however, with all the above sections of the statute quoted, it is manifestly against the plain intent of the statute to so construe it. Again, said section 14 is a particular provision designed to control actions for damages because of or

on account of an injury to the person, regardless of the form of action, and it must prevail over the more general provision made in section 15 and be treated as an exception to that general provision." (Emphasis supplied.)

Based upon such reasoning the Illinois Supreme Court held that the action was barred by section 14 because it had not been brought within two years from the date it accrued. It will be observed that the Court read into section 15 the qualification contained in section 12 "except when a different limitation is prescribed by statute" and held that section 15 does not apply when a different limitation is prescribed by statute, in that case the limitation prescribed in section 14 for the bringing of actions to recover for personal injuries.

The Supreme Court of Illinois pointed out in the above quotation that the fact that section 15 was broad enough in its language *when considered alone*, to apply the limitation of five years to the suit there in question was immaterial, since that section must be considered as a part of the *entire* Limitation Act including section 12, and with the qualification therein contained that no different limitation is prescribed by statute with respect to the cause of action sued upon.

The application of that holding by the Illinois Supreme Court to this proceeding is clear. Section 15 of the Illinois Act does not apply because the Chandler Act by section 11e itself *has prescribed a different limitation*, namely, two years subsequent to the date of adjudication.

Handtoffski v. *Chicago Traction Co.* may not be distinguished upon the ground that section 11e of the Chandler Act is not included within the language of section 12 of the Limitations Act of Illinois ("except when a different limitation is prescribed by statute") and is not a part of the Illinois Limitations Act, as is section 14 thereof, which was ap-

plicable to the cause of action sued upon in that case. The above quotation from the opinion expressly makes reference to a different limitation fixed under particular statutes, namely, "a different limitation * * * fixed * * * under particular statutes * * * such as the Employers' Liability Act." The reference is to the Federal Employers' Liability Act which contains a provision expressly limiting the bringing of suits thereunder to two years after the date the cause of action accrues. (Title 45, Sec. 56, USCA. See *Engel* v. *Davenport*, 271 U. S. 33 at 38; *Herb* v. *Pitcairn*, 384 Ill. 237, 51 N.E. (2d) 277. The Supreme Court of Illinois thus points out that the five year period of limitation provided in section 15 of the Illinois Limitations Act would not apply to a suit brought under the Federal Employers' Liability Act in an Illinois State Court because a different limitation period is prescribed by the Federal statute itself. Many other examples could be given. Thus the Federal Securities Act creates causes of action for violation thereof and provides expressly the time within which suits must be brought upon such causes of action, whether brought in the State Court or in the Federal Court. Such a period of limitation would govern such a suit to the exclusion of section 15 of the Illinois Limitations Act even though the Federal statute prescribing a different limitation is not a part of the Illinois Limitations Act itself.

The same principle excludes from application to the instant suit the five year limitation provided by section 15 of the Illinois Limitations Act because section 11e of the Chandler Act itself prescribes the limitation period applicable thereto, namely, two years after the date of adjudication in bankruptcy.

Petitioner bases his attempt to invoke section 15 of the Illinois Limitations Act upon the language of section 11e of the Chandler Act. He cannot at the same time contend that section 11e of the Chandler Act has no application.

Nevertheless, because section 11e of the Chandler Act *does* have application, section 15 of the Illinois Limitations Act does *not*.

No claim is made that any other statute, either State or Federal, provides a limitation period applicable to this proceeding. Since section 15 of the Illinois Limitations Act does not apply as construed by the Supreme Court of Illinois, the only limitation provision applicable is the two year period contained in section 11e which operates to bar the instant suit.

III.

Applying the principle of statutory construction that the words "Federal or State law" are presumed to have the same meaning in both instances in which they are used in section 11e of the Chandler Act, the conclusion follows that the section prescribes a limitation period of two years to bar actions by the trustee to set aside alleged voidable preferences.

For the convenience of the Court we again quote here section 11e of the Chandler Act, as follows:

> "A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the *Federal or State law* may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by *Federal or State law* had not expired at the time of the filing of the petition in bankruptcy." (Emphasis supplied)

The words "Federal or State law" as used in the next to the last line in the above quotation from section 11e clearly refer to claims against which the period of limitation fixed by such Federal or State law could have expired prior to the filing of the petition in bankruptcy.

The only kind of cause of action to which such a State or Federal non-bankruptcy limitation law could have application would be one which pre-existed the filing of the petition in bankruptcy and which the Trustee would inherit either from the bankrupt or his creditors. Since the meaning of the phrase "Federal or State law" as used in the next to the last line of section 11e is limited to the laws applicable to causes of action which could pre-exist the date of the filing of the petition in bankruptcy, the same meaning must be given to the phrase "Federal or State law" as used in the third line of said section. It is fair to assume that the said phrase, in the absence of an indication to the contrary, was employed by Congress throughout section 11e in the same, and in a different sense, *United States* v. *Cooper Corp.*, 312 U. S. 600 at 607 and *Mowcaqua Coal Corp.* v. *Ind. Com.*, 360 Ill. 194, 195 N.E. 607. When such meaning is given to that phrase in the third line, it is clear that the provision "for such further time as the Federal or State law may permit" cannot apply to this suit since it is based upon a cause of action (to set aside an alleged voidable preference) which cause of action could not come into existence until the date of adjudication in bankruptcy and which, therefore, could not preexist the filing of the petition in bankruptcy.

This construction, which follows from applying a common and well established principle of statutory construction, is identical with the construction which follows from considering the meaning of Section 11e in the light of the unanimous holdings of the courts construing Section 11d of the Act of 1898, to the effect that only the limitation provision prescribed by the Bankruptcy Act applies to suits by the Trustee to set aside voidable preferences.

Summarizing the position of respondent, we contend that the instant suit is barred by Section 11e of the Chandler Act because it was not brought within two years after

the date of adjudication in bankruptcy; that Section 11e must be interpreted to have that effect because (1) such interpretation establishes historical continuity with the unanimous holdings of the courts interpreting Section 11d of the Act of 1898 to the effect that the limitations provision contained in the Bankruptcy Act applies to suits by the Trustee to recover alleged voidable preferences to the exclusion of all other limitation laws, (2) because no other State or Federal law prescribing a period of limitation has been found which is applicable to a proceeding of the character of this suit, and (3) because giving the phrase "Federal and State law" the same meaning in the first part of Section 11e as it must have in the second part thereof, demonstrates the inapplicability to suits by the Trustee to recover alleged voidable preferences of the language in the first half of Section 11e "or within such further period of time as the Federal or State law may permit", confining the limitation period prescribed for causes of action of such character to "two years subsequent to the date of adjudication."

IV.

Reply to petitioner's argument.

Petitioner's first point is that the meaning of Section 11e of the Bankruptcy Act and of Sections 12 and 15 of the Illinois Statute of Limitations is clear and they require no construction.

In view of the fact that both courts below concurred in interpreting both Section 11e and the Sections of the State Statute of Limitations in a manner diametrically opposed to the construction for which petitioner contends, this is obviously an oversimplification.

So far as Section 11e is concerned, it overlooks the decisional and legislative history of this phase of the

bankruptcy legislation as well as the language of Section 11e itself which is quoted *supra* at p. 24. The entire adjective clause—"against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy"—immediately following the words "any claim" obviously qualifies that term and makes manifest the fact that Congress had in mind "claims" arising prior to the institution of the bankruptcy proceeding, since it could only be with respect to claims of such a character that the period of limitation fixed by Federal or State law had expired partially at the time of the filing of the petition in bankruptcy. The emphasis of the various draftsmen and commentators referred to in petitioner's brief upon the function of Section 11e as a statute of extension further demonstrates their concentration upon the problem of dealing with claims accruing prior to bankruptcy and vesting in the Trustee under Section 70 of the Bankruptcy Act. This manifest qualification of the phrase "any claim" makes mandatory a construction of Section 11e with reference to causes of action accruing subsequent to the filing of the petition in bankruptcy and conditioned by the Bankruptcy Act upon an adjudication—causes of action to recover alleged voidable preferences, such as those sued upon herein—in order to ascertain the Congressional intent respecting them.

The quotation from this Court's opinion in *U. S.* v. *Goldenberg*, 168 U. S. 95 at 102-103, at p. 10 of petitioner's brief states that "there are cases in which the letter of the statute is not deemed controlling, * * * when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent." That language fits this case perfectly.

The case of *Nairn* v. *McCarthy*, 120 Fed. (2d) 910 (referred to in a different connection in petitioner's brief, p. 15) clearly demonstrates the fallacy of the assumption of petitioner that language appearing superficially clear

to a layman justifies no construction when used in an Act of Congress passed in exercise of its bankruptcy power and dealing in general terms with statutes of limitation both contained in the Bankruptcy Act and in State laws. In that case the Circuit Court of Appeals for the 7th Circuit held that the language of Section 77B, Sub. b(10) of the Bankruptcy Act as amended (U.S.C.A., title 11, sec. 207, sub. b(10)) which reads as follows:

> "The running of **all** periods of time prescribed by any * * * * provision of this Act (title), and by **all statutes of limitations**, shall be suspended during the pendency of a proceeding under this section." (Emphasis ours)

did not suspend State statutes of limitation, but only "the running of all periods of time and all statutes of limitations contained in any provision of the Bankruptcy Act" and that there was no intention to make it applicable otherwise." (120 Fed. (2d) at 911-912) Based upon this interpretation of the Bankruptcy Act provision, the Court held that the Illinois State limitation provision was not suspended and the suit in consequence was barred by it. We submit that the language, "any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy" (being the language of Section 11e) is no clearer than the language, "all statutes of limitation" contained in Section 77B of the Bankruptcy Act and construed by the Court in the case upon which petitioner relies.

An even closer case is presented by the line of cases, including the decision of this Court in *Harrigan* v. *Bergdoll*, 270 U. S. 560, 70 L. Ed. 733 (referred to *supra* at p. 14), construing Section 11d of the Bankruptcy Act of 1898 (11 U.S.C.A., Sec. 29(d)) as providing entirely different treatment of suits brought by the Trustee to recover voidable preferences on the one hand and suits brought by the Trustee based upon causes of action arising under

State law and non-bankruptcy Federal law on the other hand, in spite of the plain and unitary treatment of all suits by the language of Section 11d—"Suits shall not be brought by or against a Trustee of a bankrupt estate subsequent to two years after the estate has been closed." This line of cases construed Section 11d to mean that suits brought by the Trustee on causes of action created by the Bankruptcy Act were governed exclusively by the two year limitation period provided in Section 11d, while all other suits were subject to the limitation provision of State and non-bankruptcy Federal laws. The rule laid down in this line of cases is the one codified in the present Section 11e.

The reasons for construction become all the more "cogent" when it is recalled that under the Bankruptcy Act of 1841, Bankruptcy Act of 1867 and the Bankruptcy Act of 1898, in other words throughout the history of bankruptcy legislation by Congress pursuant to its constitutional power, the courts have consistently and without exception construed the existing congressional legislation on the subject to express the intent of Congress that with respect to causes of action created by the Bankruptcy Act, the period within which the Trustee might sue was to be governed exclusively by the period set forth in the Bankruptcy Act, without reference to different periods of limitation applicable generally to suits at law and in equity arising either under State law or non-bankruptcy Federal statutes. The fundamental importance of this consideration becomes overwhelming in our judgment in determining the proper construction of Section 11e in view of the failure of Congress through any draftsman, commentator, senator, representative, report, document or otherwise, so exhaustively collected in petitioner's brief, to make any suggestion that one of the purposes of Section 11e was for the first time in one hundred years of bankruptcy legislation to set aside this established rule.

The contention of petitioner that the creation by the Illinois limitation act of a five year period of limitation with respect to suits brought by Trustees in bankruptcy to recover voidable preferences is so clear as to prohibit construction is equally wanting in merit. Again both courts below have disagreed with him. Moreover, a proper reading of the decision by the Illinois Supreme Court in *Handtoffski* v. *Chicago Union Traction Company*, 274 Ill. 282, 113 N.E. 620, *supra*, pp. 20-23 shows disagreement with him as well by the Supreme Court of Illinois, not only as to the statutory provision being so clear as to negate construction, but also as to its meaning.

Petitioner's effort (Brief pp. 11-12) to discredit our insistence upon following the construction of the catch-all provision of the Illinois statute of limitations by the Illinois Supreme Court in the *Handtoffski* case (in determining whether it is adopted by section 11e in fixing the period of limitation for the bringing of this suit) by stating that it "leads only into a sort of statutory and endless Renvoi" is in reality only a red herring. If we first consider section 11e we find it fixes a period of 2 years from the adjudication, except where a state law fixes a longer period. The question then arises, does section 15 of the Illinois statute apply and fix a five year period. The proper answer is it does, if a different limitation period is not prescribed by section 11e. If we then inquire whether section 11e does fix a different limitation period we find that it does, and that it fixes a 2 year period, unless section 15 applies and fixes a five year period. The Renvoi results from petitioner's attempt to use the catch-all provision of section 15, not from any theory of ours. We say that the period is two years both (1) because petitioner has failed to show that section 15 applies. (He can not do so because he cannot show that a different limitation is not prescribed by section 11e, and such showing is a

condition precedent to the application of section 15.) and (2) because section 11e prescribes a two year period where no state or federal non-bankruptcy statute permits a longer period. The fact that each statute re-refers to the other is not our doing; that is inherent in the statutes only because the contention is made, as petitioner has made it, that section 11e adopts the catch-all provision of section 15.[1]

> The statement in petitioner's brief, p. 12, beginning "The limitation in Section 11e of the Bankruptcy Act must necessarily . . ."

completely begs the question. It ignores both the language and legislative history of Section 11e and the interpretation by the Illinois Supreme Court of the meaning of Section 15 of the State Limitation Act, as qualified by Section 12 thereof.

Pages 12-15 of petitioner's brief set forth the "history and objectives" of Section 11e to demonstrate that they require that it be applied in accordance with its "plain letter." Petitioner begins his argument "The difficulties it was intended to obviate and its legislative history all show. . . ." We have already pointed out that the question whether the period of limitation applicable to causes of action of the Trustee to set aside voidable preferences was not a "difficulty" which Section 11e was intended to obviate since it was not a "difficulty" of any character. From the beginning of bankruptcy legislation there had been no

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[1] This whole problem is avoided by adopting our primary contention that section 11e fixes a two year period for the bringing by the Trustee in Bankruptcy of actions to recover voidable preferences, and does not adopt any other period with respect thereto, in accordance with the established rule on this subject under all the bankruptcy Acts, and by recognizing that the provision for the adoption of longer periods applies only to causes of action created by state and federal non-bankruptcy laws.

deviation from the rule that the period within which such a proceeding might be brought by the Trustee has been fixed exclusively by the Bankruptcy Act without regard to limitation provisions contained in either State or non-bankruptcy Federal laws. We have also pointed out that petitioner's brief itself makes clear that in the entire legislative history of Section 11e, beginning with the 1930 activities looking towards amendment of the Bankruptcy Act and ending with the enactment of the Chandler Act in 1938, no one in any form, in or out of Congress, suggested that the purpose of Section 11e was to terminate this long standing and well established rule of bankruptcy law. It is unthinkable that no reference of any kind would have been made to this purpose if Congress had intended to embody it in Section 11e.

Although at numerous places in petitioner's brief (pp. 18-21) he insists that Section 11e must be "construed solely as a statute of extension"—petitioner nevertheless quotes (Br. p. 23) from 1 Collier on Bankruptcy, 14th ed., a statement which twice refers to Section 11e as a "statute of limitations" and petitioner couples with this quotation his own statement that it conforms "with the legislative history of the sub-section" and gives "proper scope to its plain language." If petitioner is right in treating Section 11e solely as a statute of extension, we respectfully submit that Collier must be mistaken in referring to it as a "statute of limitations." By the same token, if Collier is correct petitioner must be wrong. That it provides a period of limitation is perfectly obvious when one seeks to answer the question within what period of time may the Trustee sue upon a cause of action with respect to which no State or non-bankruptcy Federal law provides a limitation. The answer is "obviously two years." The only alternative answer would be "until Judgment Day." We do not deny that Section 11e also acts as a statute of exten-

sion* with respect to suits by the Trustee upon causes of action with respect to which upon the date of adjudication *properly applicable* State or non-bankruptcy Federal laws provide a limitation period expiring within less than two years after the date of adjudication. That has no bearing whatever upon this case since the Court is not dealing herein with any such cause of action or any such period of limitation.

At page 24 of petitioner's brief he quotes from a Commentary on the Chandler Act by Mr. Weinstein. As an examination thereof will disclose, such quotation contains no statement, explicit or otherwise, to the effect that a suit by a trustee to set aside voidable preference is not subject, exclusively, to the limitation period of two years from the date of adjudication provided by Section 11e.

The word "applicable" in the last sentence of such quotation is significant as indicating the apparent view of Mr. Weinstein that a longer period provided by a state or non-bankruptcy federal law would apply only to those causes of action vested in the trustee, to which Section 11e

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* The absence of novelty in this conception appears from the following quotation relative to the limitation provision of the Bankruptcy Act of 1867 from *Freelander* v. *Holloman*, Fed. Cas. No. 5081 (decided 1873) (Vol. 9, Fed. Cas. p. 748 at p. 749):

"This provision in the second section provides that all rights of action barred upon the appointment of the assignee shall remain barred, whether in favor of or against the assignee, and gives both to the assignee and those claiming an adverse interest in any property claimed by the assignee in the adverse possession of others, or claimed by others, to property in the hands or under the control of the assignee, two years in which to commence proceedings in equity or at law for its recovery. This is a separate and independent provision, and has no connection with any state statute on the subject; *it may extend or may contract* the time provided in the state statutes of limitations. Thus, if at the time of the appointment of the assignee but a few days remained of the time necessary to complete the bar, the time would be extended; or if the statute had just commenced running, and under the state law would have ten years to run, as in case of actions of ejectment to recover real estate, it would be complete within two years." (Emphasis ours.)

permitted them to apply; in other words to which they were "applicable."

An instance of the application of a non-bankruptcy Federal statute of limitations would arise if the debtor at the date when the petition in bankruptcy was filed had a right of action against a third person, which was not then outlawed, for a violation of the Federal Securities Act of 1933. The statute of limitations applicable to the cause of action, which the trustee would inherit, would be the one contained in that Federal statute (USCA, Title 15, Sec. 77m). If the trustee inherited a cause of action arising under State law from either the bankrupt or creditors of the bankrupt which was not outlawed at the time of the filing of the petition in bankruptcy, the applicable statute of limitations would be the state statute governing it, if bankruptcy had not ensued.

The same comment on our part is applicable to the quotation at pages 23-24 of petitioner's brief from Collier's Bankruptcy, 14 Ed. published in 1940. We find there the same use of the word "applicable" as is made by Mr. Weinstein and the same failure to make any statement to the effect that a suit by a trustee to set aside a voidable preference is not subject exclusively to the limitation period of two years subsequent to the date of adjudication provided by Section 11e. In our opinion both of these authorities support our position. They certainly do not in any way attack it or support any contention to the contrary of our position.

In the quotation from Collier in petitioner's brief, p. 24, appears the statement:

> "The character of the suit or proceeding brought is immaterial so long as it is 'in behalf of the estate'."

An examination of the last prior (13th) edition of Collier on Bankruptcy discloses the origin of the above quoted

statement from the later edition. In said 13th edition he makes the statement with reference to Section 11d of the Act of 1898, that (Vol. 1, p. 425)

> "It seems also that the character of the suit is immaterial provided it amounts to the prosecution of a demand in a court of justice, * * *"

In support of the foregoing statement, Collier cites *Bailey* v. *Glover*, 21 Wall. 342, and two State cases, all involving the Act of 1867. It is apparent, therefore, that Collier in using the above quoted language was not introducing a *novel* thought resulting from the enactment of Section 11e of the Chandler Act in 1938, but was merely repeating an idea which was originated with reference to the Act of 1867 and was continued with reference to Section 11d of the Act of 1898. It follows that the above quoted statement from Collier furnishes no basis for the contention of petitioner that the proper interpretation of Section 11e subjects to State statutes of limitation for the first time in almost 100 years of Congressional legislation relative to bankruptcy suits based on causes of action to set aside voidable preferences.

In his reply brief filed in support of his application for certiorari petitioner attempted to escape the holding in *Handtoffski* v. *Chicago Union Traction Company*, 274 Ill. 282, 113 N.E. 620, by asserting that Section 15 of the Illinois Limitations Act does apply herein because no different limitation is prescribed by Section 11e and by dismissing the reference in the opinion of the Supreme Court of Illinois in that case to causes of action created under the Employers' Liability Act as inapplicable here, since the limitation fixed in the Federal Employers' Liability Act is an integral part of the substantive right which may not be modified by a State statute of limitations. Petitioner overlooks the fact that the cause of action to set aside voidable preferences is created by the Bankruptcy

Act and Section 11e is properly to be regarded, in so far as it is applicable to such causes of action, as an integral part of the substantive right. It differs in no respect in this regard from the causes of action created by the Employer's Liability Act. The importance of the *Handtoffski* case is that it in effect holds that because of Section 12 of the State Limitations Act, which must be read in *pari materia* with Section 15, the "catch all" provision of Section 15 has no application to causes of action of such character. Nothing in Section 11e of the Bankruptcy Act can change the meaning of Section 15 of the State Limitations Act as interpreted by the Illinois Supreme Court in the *Handtoffski* case. Section 11e did not adopt the *time* fixed in the State law as the applicable period, as petitioner heretofore contended in this connection. On the contrary, it adopts *the State law* with respect to those causes of action as to which the State law prescribes a limitation period. In making this statement we do not wish to be understood as waiving our contention that Section 11e applies to the suit at bar a two year limitation without regard to State law. This portion of the argument deals with the other question, which is, whether there is *any State law* providing a limitation period with respect to the cause of action in the suit at bar.

Petitioner attacks the opinion of the Circuit Court of Appeals as being "plainly erroneous." (Br. pp. 25-27) While we do not agree with him it must be remembered that if the order under review is correct it must be affirmed whether the reasons for it stated in the opinion below are sustained or not.

The opinion of the Circuit Court of Appeals cannot be understood by reading the excerpts quoted in petitioner's brief. It must be read as a whole. (Rec. 20-23)

The argument made by respondent to the Court of Appeals was substantially the same as respondent's argu-

ment herein contained. There are portions of the opinion of the Circuit Court of Appeals which are not as clear and unambiguous in adopting respondent's contentions as they might be. Nevertheless, it is plain to us from reading that court's opinion that it held (1) the cause of action to recover a voidable preference having been created by the Bankruptcy Act which also contains a provision (Sec. 11e) governing the time within which suit must be brought thereon, that provision controls and may not be modified by the Illinois State Statute of Limitations, and (2) that the Illinois State Statute of Limitations does not purport to fix a period of limitation governing the suit at bar, since it has no application to a cause of action created by a statute which at the same time limits the time within which suit may be brought. The opinion summarizes the holding in the sentence:

> "Since it is the Bankruptcy Act which creates the cause of action here, it must (be held to) provide the period for bringing it, and in the absence of other provision, the two-year one applies." (Rec. p. 22)

The rule stressed by counsel for petitioner (Br. p. 26) that, when a cause of action arises out of a Federal statute containing no provision for any period of limitation, the State statute of limitations will control, is conceded by us provided there is a State statute of limitations which relates to such cause of action. However, such principle has no application here, both because the Bankruptcy Act by Section 11e does provide the limitation period and at the same time creates the cause of action and for the additional reason that there is no State statute of limitations, according to the Supreme Court of Illinois, which relates to causes of action of the character sued upon herein.

Since petitioner agrees with us that the primary question at bar is the proper construction of Section 11e and since Section 11e is a part of the Bankruptcy Act creating causes of action to recover voidable preferences, even if petitioner

were correct in asserting (Br. p. 25) that the Circuit Court of Appeals has in effect interpolated into Section 11e after the phrase "or within such further period of time as the Federal or State law" the words "creating the cause of action" before "may permit", such interpolation would be wholly immaterial. Petitioner himself contends that the State law is applicable only because of its adoption by Section 11e. Consequently, this attack upon the Circuit Court of Appeals opinion has no practical significance whatsoever in determining the correctness of the order under review.

We are confident that the order under review is correct and should be affirmed since it carries out the readily ascertainable intention of Congress in enacting Section 11e to continue in effect the well established rule (almost a century old and which has survived the enactment of several bankruptcy acts), that the limitation period contained in the Bankruptcy Act itself, to the exclusion of all other periods of limitation to be found in State or non-bankruptcy Federal laws, shall fix the period within which suits may be brought by the Trustee to recover voidable preferences. For this purpose Section 11e has fixed a period of two years from the date of adjudication, which period expired almost three years before petitioner brought the instant suit.

If legislative considerations were in order, the wisdom of a reasonably short period of limitations for the bringing of a suit by the Trustee in Bankruptcy to set aside alleged voidable preferences appears to us to be obvious. All transactions occurring within four months prior to the filing of the petition in bankruptcy in which creditors of the bankrupt receive payments on account of their claims remain subject to attack and consequently in an unsettled condition until suit is brought by the Trustee to set them aside as alleged voidable preferences or the period of limitation within which such suit might be brought has

expired. This Court pointed out in *Stoll* v. *Gottlieb*, 305 U. S. 165, 83 L. Ed. 104 that the principle requiring that there be an end to litigation is a salutary one. It is particularly important with respect to commercial transactions.

The same considerations making it wise to provide a reasonably short period of limitation for actions of this character makes it equally wise that the same limitation be uniformly applied in all actions of this character, without regard to the particular state or judicial district in which the proceedings may be brought. It is a matter with respect to which it is just as important for Congress to speak without interference or modification by State law as is the fixing of the period of time prior to the filing of the petition in bankruptcy within which must occur transactions subject to attack as voidable preferences. This uniformity can be accomplished only by maintaining in full force and effect the rule practically a century old that the limitation period for the bringing of actions of such character is to be found in the Bankruptcy Act itself to the exclusion of all other laws, either State or Federal, providing limitation periods.

CONCLUSION.

We submit that the judgment below is proper and should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 322.—October Term, 1944.

Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt, Petitioner, *vs.* The Central National Bank & Trust Company of Peoria, a National Banking Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 29, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

This case presents the narrow issue of whether Section 11e of the Bankruptcy Act, 11 U. S. C. § 29e, bars at the end of two years from the date of adjudication in bankruptcy an action brought by the trustee in bankruptcy to set aside and recover a preferential transfer.

On April 11, 1938, N. L. Rogers & Company, Inc., filed a voluntary petition in bankruptcy and was duly adjudged a bankrupt on the same day. On March 3, 1943, the petitioner trustee filed a complaint under Section 60 of the Bankruptcy Act, 11 U. S. C. § 96, against the respondent bank to set aside and recover payments totalling over $300,000 alleged to have been given illegally by the bankrupt to the respondent within four months prior to the filing of the bankruptcy petition. The District Court dismissed the complaint on the ground that the suit had been instituted more than two years subsequent to the date of adjudication in bankruptcy and hence was barred by Section 11e. It thus overruled the trustee's contention that Illinois law allowed him five years in which to bring this action and that this five-year limitation was controlling since it fell within the provision of Section 11e allowing suits "within such further time as the Federal or State law may permit." 53 F. Supp. 265. The court below affirmed this judgment. 141 F. 2d 150. In our view, such a result is plainly right.

Two-year limitations on suits by and against trustees have long been integral parts of federal bankruptcy statutes. Section 8 of the Bankruptcy Act of 1841, 5 Stat. 440, 446, 447, applied a two-year limitation on any "suit at law or in equity" by or against any assignee of the bankrupt. Courts held that this related only to suits involving claims held by the bankrupt before assignment, rather than to suits on claims arising after the bankruptcy proceedings began,[1] but its applicability as to rights accruing to the assignee on the date of the assignment by virtue of the Bankruptcy Act apparently was not raised or determined.

Section 2 of the Bankruptcy Act of 1867, 14 Stat. 517, 518, which was reenacted in substantially the same form in Revised Statutes § 5057, placed a similar limitation on any "suit at law or in equity . . . by or against such assignee . . . touching the property and rights of property" of the bankrupt. Here again the limitation was held to apply only to suits growing out of disputes and transactions prior to assignment.[2] *Dushane* v. *Beall*, 161 U. S. 513. But in *Bailey* v. *Glover*, 21 Wall. 342, 346, this Court stated that this limitation "applies to all judicial contests between the assignee and other persons touching the property or rights of property of the bankrupt transferable to or vested in the assignee." See also *Gifford* v. *Helms*, 98 U. S. 248, 252; *Jenkins* v. *International Bank*, 106 U. S. 571, 575. The inference seems clear from this that suits to set aside preferential transfers made prior to the assignment would have been held to fall within the reach of the two-year limitation.

Section 11d of the Bankruptcy Act of 1898, 30 Stat. 544, 549, provided that "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed." State and lower federal courts explicitly and uniformly held that this two-year limitation controlled the trustee's right to set aside and recover preferential transfers under Section 60 of the Act.[3] But courts differed as to whether Section 11d or state statutes of limitation applied to causes of action in-

[1] See In re Conant, 5 Blatch. 54; Stevens v. Hauser, 39 N. Y. 302. Cf. Banks v. Ogden, 2 Wall. 57, 70.

[2] See Bowen v. Delaware, L. & W. R. R. Co., 153 N. Y. 476, 47 N. E. 90. Cf. Phelan v. O'Brien, 13 F. 656.

[3] Davis v. Willey, 273 F. 397; Meikle v. Drain, 69 F. 2d 290; Arnold Grocery Co. v. Shackelford, 140 Ga. 585, 79 S. E. 470.

herited by the trustee from the bankrupt or the bankrupt's creditors.[4]

It was this conflict under Section 11d of the 1898 Act that was primarily responsible for the framing of the new Section 11e in 1938. This latter provision, which is controlling in this case, settles the problem by stating in part that "A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy."

In light of the judicial construction and application of analogous provisions in earlier bankruptcy acts, it is significant that Congress in Section 11e failed to enlarge the time for bringing suits arising under the Bankruptcy Act by making state statutes of limitation of longer duration applicable to such federal causes of action. None of the prior provisions had been construed so as to apply state statutes of limitations to actions by trustees based on claims arising under the bankruptcy statutes. And the courts had frankly and unmistakably imposed the two-year limitation of Section 11d of the 1898 Act, which is the immediate predecessor of Section 11e, to suits by trustees to set aside and recover preferential transfers. The legislative background and history, as well as the language of Section 11e, are barren of any basis for concluding that Congress intended to make suits of this nature subject to longer limitations imposed by state laws.[5] Congress could

[4] Among those cases holding that Section 11d applied are Isaacs *v.* Neece, 75 F. 2d 566, Engebretson *v.* West, 133 Neb. 846, 277 N. W. 433, and Callaghan *v.* Bailey, 293 N. Y. 396, 57 N. E. 2d 729. Cases holding that the state statutes of limitation applied include Davis *v.* Willey, 273 F. 397, and Silverman *v.* Christian, 123 N. J. Eq. 506, 198 A. 832. See also Charlesworth *v.* Hipsch, Inc., 84 F. 2d 834; Nairn *v.* McCarthy, 120 F. 2d 910.

[5] H. Rep. No. 1409 (75th Cong., 1st Sess.) p. 20, stated that "A new provision in subdivision e permits receivers and trustees within 2 years after the adjudication to institute suits on claims against which the period of limitation fixed by Federal or State law had not expired at the time of the bankruptcy or within such further time as the Federal or State law may permit."

S. Rep. No. 1916 (75th Cong., 3rd Sess.) p. 13, stated: "The provisions of the existing law in regard to suits by or against trustees have been revised and modified, and receivers are included. The period of limitations in respect to such suits has been restricted in the bill to 2 years after the date of adjudication instead of 2 years after the date of the closing of the estate."

See also Joint Hearings before the Subcommittees of the Committees on the Judiciary (72d Cong., 1st Sess.) on S. 3866, Part 4, pp. 932-933; 6 Journal of Nat. Assoc. of Referees in Bankruptcy 65; 1 Collier on Bankruptcy (14th Ed.) 1186.

have expressly restricted the field within which the two-year limitation was to be operative had it so wished. Its failure to do so cannot be ignored.

The actual language used in Section 11e is clearly appropriate to an action under Section 60. Section 11e is not limited by its words to actions inherited by the trustee; nor does it discriminate against actions by the trustee accruing to him under the Act. It provides simply that the trustee must bring action on any claim in behalf of the estate within two years subsequent to the date of adjudication or within such further time as the federal or state law permits, provided that such law did not bar the action on the date when the petition was filed.

Here the only applicable law is Section 60 of the Bankruptcy Act, which generates the cause of action and which contains no time limitations as to actions brought pursuant thereto. And since the trustee's right to set aside and recover preferential transfers relates to transactions occurring prior to the filing of the petition and since this right did not accrue before the date on which the petition was filed, such an action obviously cannot be excluded from the limitation on the ground that it was barred by federal or state law at the time the petition was filed. Hence the trustee was bound to "institute proceedings in behalf of the estate" to set aside and recover any preferential transfers "within two years subsequent to the date of adjudication." More than two years having elapsed between the date of adjudication and the commencement of the suit in this instance, the courts below properly held that the action was barred under Section 11e.

Inasmuch as the federal Bankruptcy Act has created the liability and has also fixed the limitation of time for commencing actions to enforce it, we have no occasion to consider the trustee's arguments concerning the applicability and construction of the Illinois statutes of limitation. Cf. *Campbell* v. *Haverhill*, 155 U. S. 610; *McClaine* v. *Rankin*, 197 U. S. 154; *Rawlings* v. *Ray*, 312 U. S. 96; *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 155, 156.

The judgment of the court below is

Affirmed.